Supreme Court, U.S.
FILED

981848 MAY 17 1999

OFFICE OF THE CLERK

No. _____

IN THE

Supreme Court of the United States

COEUR D'ALENE TRIBE,

Petitioner,

v.

STATE OF MISSOURI EX REL.
JEREMIAH (JAY) NIXON,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

Raymond C. Givens
Counsel of Record
GIVENS, FUNKE & WORK
424 Sherman Avenue
Coeur d'Alene, Idaho 83816-0969
(208) 667-5486

Patricia M. Schwarzschild
Michael R. Shebelskie
William H. Wright, Jr.
HUNTON & WILLIAMS
Riverfront Plaza - East Tower
951 East Byrd Street
Richmond, Virginia 23219-4074
(804) 788-8200

Counsel for Coeur d'Alene Tribe

THE LEX GROUP • 1205 East Main Street • Suite 2 East • Richmond, VA 23219
(804) 644-4419 • (800) 856-4419 • Fax: (804) 644-3256

130PP

QUESTIONS PRESENTED

1. Can a plaintiff use Fed.R.Civ.P. 41(a) to bypass the requirements of 28 U.S.C. § 1292(b) and Fed.R.Civ.P. 54(b) and manufacture an interlocutory appeal over a non-final order that dismisses fewer than all of the defendants, by voluntarily dismissing without prejudice the remaining defendants and refiling its claims against those voluntarily dismissed defendants in a new lawsuit?

2. When a defendant removes to federal court a state court claim that raises a substantial federal question, does federal jurisdiction attach to the entire claim or can the district court split the claim for bifurcated adjudication between federal and state court?

LIST OF PARTIES

The parties to the appeal below were the petitioner, the Coeur d'Alene Tribe, and the respondent, State of Missouri *ex rel.* Jeremiah (Jay) Nixon. UniStar Entertainment, Inc., was also a party in the proceedings before the district court in this matter.

Argument in the appeal below was consolidated with another appeal, *State of Missouri ex rel. Jeremiah (Jay) Nixon v. UniStar Entertainment, Inc., et al.*, Eighth Circuit Case No. 98-1554 EMCG. The parties to that proceeding were appellant, State of Missouri *ex rel.* Jeremiah (Jay) Nixon, and appellees, Ernest Stensgar, in his official capacity as Chairman of the Tribe; David Matheson; UniStar Entertainment, Inc.; and Executone Information Systems, Inc.

CORPORATE DISCLOSURE STATEMENT

Both the Coeur d'Alene Tribe and Missouri are governmental bodies which have no parent or subsidiary companies. Ernest Stensgar and David Matheson are individual persons. UniStar Entertainment, Inc., is the subsidiary of UniStar Gaming, Inc., which in turn is the subsidiary of Executone Information Systems, Inc.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

LIST OF PARTIES ii

CORPORATE DISCLOSURE STATEMENT ii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 1

STATUTORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 2

A. Indian Gaming Regulatory Act 2

B. The Tribe And The National Indian Lottery 4

C. The Proceedings Below 5

1. District Court Proceedings 5

2. Eighth Circuit Proceedings 7

REASONS FOR GRANTING THE WRIT 8

I. THE EIGHTH CIRCUIT'S DECISION REGARDING APPELLATE JURISDICTION CONTRADICTS THE HOLDINGS OF MULTIPLE CIRCUITS AND CONTRAVENES THIS COURT'S EFFORTS TO PREVENT PIECEMEAL APPEALS 9

II. THE EIGHTH CIRCUIT'S DECISION REGARDING FEDERAL QUESTION JURISDICTION CONFLICTS WITH THIS COURT'S RULINGS AND THE ORDERLY ADMINISTRATION OF JUSTICE 16

A. The Standards For Federal Question Jurisdiction 16

B. Missouri's Claim "Arises Under" Federal Law 18

1. Missouri's Claim Raises A Federal Question 18

2. A Strong Federal Interest Exists In The Federal Question Raised By Missouri's Claim 20

C. Federal Jurisdiction Exists Over Missouri's Entire Claim 24

CONCLUSION 27

TABLE OF AUTHORITIES

FEDERAL CASES

Banco Nacional de Cuba v. Sabbatino,
376 U.S. 398 (1964) 23

Bryan v. Itasca County, Minnesota,
426 U.S. 373 (1976) 21

California v. Cabazon Band of Missouri Indians,
480 U.S. 202 (1987) 21

Chappelle v. Beacon Comm., Inc.,
84 F.3d 652 (2d Cir. 1996) 9, 11

Chicago & North Western Transp. Co. v. Atchison, Topeka and Santa Fe Ry,
609 F.2d 1221 (7th Cir. 1979) 17

City of Chicago v. International College of Surgeons,
522 U.S. 156, 118 S.Ct. 523 (1997) 16, 17, 24, 25

Cook v. Rocky Mountain Bank Note Company,
974 F.2d 147 (10th Cir. 1992) 10

Coopers & Lybrand v. Livesay,
437 U.S. 463 (1978) 9

Dannenburg v. Software Toolworks, Inc.,
16 F.3d 1073 (9th Cir. 1994) 9

DeCoteau v. District County Court,
420 U.S. 425 (1975) 22

Federated Department Stores, Inc. v. Moitie,
452 U.S. 394 (1981) 17

Fisher v. District Court of Sixteenth Judicial Dist. of Montana,
424 U.S. 382 (1976) 22

Flanagan v. United States,
465 U.S. 259 (1984) 9

Fletcher v. Gagosian,
604 F.3d 637 (9th Cir. 1979) 11, 12

Forest County Potawatomy Community of Wisconsin v. Norquist,
45 F.3d 1079 (7th Cir. 1994) 23

Forest County Potawatomy Community of Wisconsin v. Doyle,
803 F. Supp. 1526 (E.D. Wis. 1992) 20

Franchise Tax Board v. Construction Laborers Vacation Trust,
463 U.S. 1 (1983) 8, 16, 17, 22, 25

Heimann v. Snead,
133 F.3d 767 (10th Cir. 1998) 9

Horowitz v. Alloy Automotive Co.,
957 F.2d 1431 (7th Cir. 1992) 9

Idaho v. Coeur d'Alene Tribe of Idaho,
521 U.S. 261, 117 S.Ct. 2028 (1997) 4

Iowa Mutual Ins. Co. v. LaPlante,
480 U.S. 9 (1987) 22

Kentucky v. Graham,
473 U.S. 159 (1985) 14

Littell v. Nakai,
344 F.2d 486 (9th Cir. 1965) 22

Merrell Dow Pharmaceuticals, Inc. v. Thompson,
478 U.S. 804 (1986) 17, 23, 25, 26

Mesa v. United States,
61 F.3d 20 (11th Cir. 1995) 10

Milan Exp. Co. v. Western Surety Co.,
886 F.2d 783 (6th Cir. 1989) 17

Morton v. Mancari,
417 U.S. 535 (1974) 21

National Farmers Union Ins. Companies v. Crow Tribe of Indians,
471 U.S. 845 (1985) 22

Oneida Indian Nation of New York v. County of Oneida,
414 U.S. 661 (1974) 20, 21

Republic of Iraq v. First Nat'l City Bank,
353 F.2d 47 (2d Cir. 1965) 23

Republic of Philippines v. Marcos,
806 F.2d 334 (2d Cir. 1986) 23

Rivet v. Regions Bank of Louisiana,
522 U.S. 470, 118 S. Ct. 921 (1998) 17

Ryan v. Occidental Petroleum Corp.,
577 F.2d 298 (5th Cir. 1978) 9

Seminole Tribe of Florida v. Florida,
517 U.S. 44 (1996) 21

South Dakota v. Yankton Sioux Tribe,
522 U.S. 329, 118 S. Ct. 789 (1998) 21

State Treasurer v. Barry,
168 F.3d 8 (11th Cir. 1999) 9

Texas Indus., Inc. v. Radcliff Materials, Inc.,
451 U.S. 630 (1981) 23

Thomson v. Gaskill,
315 U.S. 442 (1942).....26

United Mine Workers v. Gibbs,
383 U.S. 715 (1966) 25

United States v. Sioux Nation of Indians,
448 U.S. 371 (1980) 21

Williams v. Lee,
358 U.S. 217 (1959) 21

Wisconsin Dept. of Corrections v. Schacht,
118 S. Ct. 2047 (1998) 25

DOCKETED CASES

Great Rivers Cooperative v. Farmland Industries, Inc.,
Eighth Circuit Case Nos. 98-2527, 98-2528 13

Wisconsin v. Coeur d'Alene Tribe,
Case No. 97-C-711-5 (W.D. Wis. 1998). 19

FEDERAL STATUTES, RULES AND REGULATIONS

18 U.S.C. § 1166 1

25 U.S.C. § 2702 ..... 2, 3

25 U.S.C. § 2710 3

25 U.S.C. § 2713 3

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1291 10

28 U.S.C. § 1292(b) ..... passim

28 U.S.C. § 1331 ..... 1, 5, 16, 18

28 U.S.C. § 1441(b) 16

28 U.S.C. § 1447(d) 26

Fed.R.Civ.P. 41(a) ..... passim

Fed.R.Civ.P. 54(b) ..... passim

Fed.R.App.P. 4(a)(1)(A) 12

25 C.F.R. § 531.1(a) 3

25 C.F.R. § 533.3(a)(ii) 3

MISCELLANEOUS

Idaho Const. Art. III § 20(a) 4

58 Fed. Reg. 8478 (Feb. 12, 1993) 4

14 Wright & Miller § 3722 (1976) 18

PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The corrected opinion of the United States Court of Appeals for the Eighth Circuit, dated January 6, 1999, is reported at 164 F.3d 1102 and is reproduced at pages 1a-18a of the appendix to this petition ("Pet. App."). The unreported opinions and orders of the United States District Court for the Western District of Missouri, dated September 29, 1997 and November 19, 1997, are reproduced at Pet. App. 19a-23a and 24a-30a respectively. The order of the United States Court of Appeals for the Eighth Circuit denying rehearing and denying rehearing *en banc*, dated February 17, 1999, is not yet reported and is reproduced at Pet. App. 52a.

JURISDICTION

The opinion of the court of appeals was entered on January 6, 1999. Pet. App. 2a. The court of appeals denied a timely petition for rehearing on February 17, 1999. Pet. App. 52a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The federal statutes pertinent to the first question presented in this petition are 28 U.S.C. §§ 1291 and 1292(b). The relevant Federal Rules of Civil Procedure are Rule 41(a) and Rule 54(b). Copies of these provisions are reproduced in the appendix to this petition.

The federal statutes pertinent to the second question are 28 U.S.C. § 1331 and the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701 *et seq.*, and 18 U.S.C. § 1166. The federal regulations at issue are 25 C.F.R. § Pt. 501 *et. seq.* Relevant portions of these provisions are reproduced in the appendix.

STATEMENT OF THE CASE

This petition raises two important jurisdictional questions. The first is the ability of a plaintiff to manufacture an interlocutory appeal over non-final orders through a Rule 41(a) dismissal without prejudice. In a split decision that contradicts the holdings of six other circuits, the Eighth Circuit held that a plaintiff could fabricate interlocutory appellate jurisdiction in that manner in contravention of both 28 U.S.C. § 1292(b) and Fed.R.Civ.P. 54(b).

The second question concerns the subject matter jurisdiction of a district court in the removal context. Missouri filed this suit against the Coeur d'Alene Tribe to enjoin, and to recover penalties on account of, the Tribe's "National Indian Lottery". The Eighth Circuit recognized that the success of Missouri's suit hinges on whether the lottery complied with the federal Indian Gaming Regulatory Act and instructed the district court to decide that federal question. Depending upon the outcome of that question, however, the Eighth Circuit's decision requires the district court to remand Missouri's claim to state court for adjudication of the remaining issues posed by that claim. Such bifurcation contravenes this Court's established jurisprudence and yields unworkable, and unfair, consequences.

A. Indian Gaming Regulatory Act

Congress enacted in 1988 the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701 *et seq.* ("IGRA"). As IGRA declares, its purpose is to overcome the history of privation and poverty that has afflicted most Indian tribes by encouraging "tribal economic development, self-sufficiency, and strong tribal governments" through the development of gaming operations. 25 U.S.C. § 2702(1). Its purpose also is "to provide a statutory basis for the regulation of gaming by an Indian tribe" and to provide federal standards "to protect such

gaming as a means of generating tribal revenue." 25 U.S.C. §§ 2702(2) and (3).

In furtherance of these congressional purposes, IGRA divides Indian gaming into three classes and prescribes the conditions under which Indian tribes can conduct gaming in each class. 25 U.S.C. § 2710. For a tribe to conduct a lottery, which IGRA classifies as a type of class III gaming, the lottery must satisfy three requirements. First, the tribe must enact an ordinance or resolution that authorizes the game and that has been approved by the chairman of the National Indian Gaming Commission ("NIGC"). 25 U.S.C. § 2710(d)(1)(A). Second, the tribe must locate the game in a state that permits such a game for any purpose by any person, organization or entity. 25 U.S.C. § 2710(d)(1)(B). Third, the tribe must conduct the game in conformity with a compact between it and the state in which the tribe is located. 25 U.S.C. § 2710(d)(1)(C). IGRA further provides that such a compact is not effective unless approved by the Secretary of Interior. 25 U.S.C. § 2710(d)(3)(B).

IGRA vests the NIGC with broad authority to oversee and enforce compliance with these and other requirements of IGRA. The NIGC's powers include the authority to investigate Indian gaming operations and to sanction tribes that fail to comply with IGRA. If the NIGC determines that a tribe's gaming operation violates IGRA, the NIGC can order the suspension of the gaming operation and fine the tribe. 25 U.S.C. § 2713.

If a tribe engages a management company to conduct any of its gaming operations, the chairman of the NIGC must approve the management contract. 25 U.S.C. § 2710(d)(9). That approval can be given only if, among other things, the chairman determines that the proposed gaming operation complies with IGRA. 25 C.F.R. § 531.1(a); 25 C.F.R. § 533.3(a)(ii).

B. The Tribe And The National Indian Lottery

The Coeur d'Alene Tribe is a federally recognized Indian tribe headquartered in Plummer, Idaho. Pet. App. 78a. *See Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 117 S.Ct. 2028, 2032 (1997). Pursuant to IGRA, the Tribe entered into a compact with the State of Idaho in 1992 to conduct certain gaming operations including lotteries, which Idaho permits. Idaho Const. Art. III § 20(a). The Secretary of the Interior duly approved the compact. 58 Fed. Reg. 8478 (Feb. 12, 1993). As the district court recognized, the NIGC also approved the Tribe's lottery, specifically finding as part of that process that IGRA permits a lottery in which persons from locales outside the Tribe's reservation can order tickets by phone. *See* May 6, 1999 Order, p. 3.

After receiving those approvals, the Tribe commenced in January, 1997 the National Indian Lottery (also referred to as the US Lottery). The Tribe conducted the National Indian Lottery with the assistance of UniStar Entertainment, Inc., pursuant to a NIGC approved management contract. Pet. App. 83a.

As part of its operations, the National Indian Lottery maintained a web site on the Internet. Pet. App. 83a. Persons in certain states, including Missouri, could access that site and, under carefully regulated procedures, establish with the National Indian Lottery an account funded through their credit cards. They could then submit to the Tribe via the telephone or the Internet (which uses phone lines) orders to purchase chances in the National Indian Lottery. If the Tribe accepted such an order, the Tribe deducted the purchase price from the subscriber's pre-established account on the Tribe's reservation. Pet. App. 83a-85a.

The Tribe ceased operation of the National Indian Lottery in December, 1998. Missouri, however, still seeks damages for the time the National Indian Lottery operated.

C. The Proceedings Below

1. District Court Proceedings

On May 28, 1997, Missouri, through its Attorney General, filed a petition against the Tribe and UniStar in the Circuit Court of Jackson County at Kansas City, Missouri. Without mentioning the federal approvals the Tribe had received for the National Indian Lottery, Missouri alleged that the Tribe and UniStar had falsely represented to Missouri residents that the National Indian Lottery's acceptance of telephone and Internet orders was "legal". Pet. App. 88a-89a. Missouri further alleged that the Tribe and Unistar had failed to inform Missouri residents that their participation therein was "unlawful". Pet. App. 89a. Based on those allegations, Missouri sought to enjoin the National Indian Lottery and to recover unspecified civil penalties and other costs under the Missouri Merchandising Practices Act.

The Tribe and UniStar timely removed the action to the United States District Court for the Western District of Missouri on the basis of 28 U.S.C. § 1331. The removal papers invoked that statute because Missouri's petition raises a substantial federal question, namely whether the National Indian Lottery complies with IGRA. A second basis was that IGRA completely preempts Missouri's claim.

Missouri filed a motion to remand. By order entered September 29, 1997, the district court denied that motion and retained jurisdiction over Missouri's entire claim. Pet. App. 19a-23a.

The district court later denied, by order entered November 19, 1997, Missouri's motion pursuant to 28 U.S.C. § 1292(b) to certify for interlocutory review the denial of its remand motion. Pet. App. 24a-25a. The district court granted in the same order the Tribe's motion to dismiss on the basis of sovereign immunity. Pet. App. 26a-28a. This left UniStar as the remaining defendant. The November 19, 1997 order, however, did not enter final judgment as to the Tribe pursuant to Fed.R.Civ.P. 54(b), and Missouri never asked for entry of such a judgment. Missouri also never requested § 1292(b) certification in respect to the Tribe's dismissal.

In lieu of moving the district court for such relief, Missouri filed with the district court nearly two months later on January 28, 1998, a notice voluntarily dismissing UniStar without prejudice pursuant to Fed.R.Civ.P. 41(a). Two days later Missouri filed a notice of appeal challenging the district court's denial of the state's motion to remand and granting of the Tribe's motion to dismiss.

Meanwhile, in a move that the district court declared "just reeks of forum shopping," Missouri filed on January 29, 1998, a second lawsuit in the Circuit Court of Madison County, Missouri (on the other side of the state from Missouri's first lawsuit and in a different federal court district). Missouri's new lawsuit asserted the same claim as the state's first lawsuit and again named UniStar as a defendant. It also named as defendants the Tribe's chairman, Ernest Stensgar, in his official capacity; the Tribe's director of gaming, David Matheson; and an affiliate of UniStar, Executone Information Systems, Inc. The defendants timely removed that lawsuit to the United States District Court for the Eastern District of Missouri on the same bases that the Tribe and UniStar had removed Missouri's original lawsuit.

In an order entered February 9, 1998, the district court overseeing Missouri's new lawsuit adopted the jurisdictional holdings from the district court in Missouri's first lawsuit and denied the state's motion to remand. In the same order the district court transferred the new lawsuit to the Western District of Missouri to correct Missouri's forum shopping. Pet. App. 31a-37a. Missouri then filed an interlocutory notice of appeal from the February 9, 1998 order in the second suit contesting the denial of its requested preliminary injunction.

2. Eighth Circuit Proceedings

The Eighth Circuit consolidated Missouri's two appeals for purposes of oral argument and disposed of both in a single opinion filed January 6, 1999. The court of appeals unanimously held that it lacked jurisdiction over Missouri's interlocutory appeal in the second lawsuit. Pet. App. 9a-10a; 14a. That ruling is not at issue in this petition.

The Eighth Circuit's holdings regarding Missouri's appeal in its first lawsuit, however, are at issue. In a split decision, two of the panel judges held that appellate jurisdiction existed notwithstanding the lack of any § 1292(b) certification or Rule 54(b) final judgment. Pet. App. 5a-9a. In dissent, Judge Donald Lay, the former chief judge of the Eighth Circuit, noted that the majority's decision fails "to follow the rule of finality which governs appeals in federal courts." Pet. App. 14a. He also warned that the majority's decision invites "a means to circumvent established rules governing review of final orders," thereby encouraging a multiplicity of lawsuits against common defendants and eroding judicial efficiency. Pet. App. 18a.

Turning to the question of the district court's subject matter jurisdiction, the majority recognized that the issue whether the National Indian Lottery complies with IGRA is

"critical" to the existence of Missouri's claim. Pet. App. 12a. It further recognized that the question of compliance with IGRA "is one of federal law." *Id.* The Tribe argued that under this Court's precedents, those facts established the existence of federal question jurisdiction over Missouri's entire claim. They showed that Missouri's "right to relief under state law requires resolution of a substantial question of federal law in dispute between the parties." *Franchise Tax Board v. Construction Laborers Vacation Trust*, 463 U.S. 1, 13 (1983).

The majority responded to this argument in a footnote, stating merely that federal question jurisdiction could not exist on this basis because Missouri's claim was created by state law. Pet. App. 13a. The court of appeals instead remanded the case to the district court with instructions to adjudicate the federal law question whether the National Indian Lottery complies with IGRA. *Id.* Those instructions directed the district court to retain jurisdiction over the remainder of Missouri's claim only if the district court decides that the National Indian Lottery satisfied IGRA. *Id.* This timely petition followed.

REASONS FOR GRANTING THE WRIT

The Eighth Circuit's decision that appellate jurisdiction exists in this case merits review because it contradicts decisions from the Second, Fifth, Seventh, Ninth, Tenth and Eleventh Circuits. Contrary to the Eighth Circuit, these six other circuits hold that a plaintiff cannot manufacture interlocutory appellate jurisdiction in the manner Missouri did. This Court should resolve this mature conflict among the courts of appeals, which raises profound questions regarding judicial efficiency and the orderly administration of justice.

The Eighth Circuit's treatment of federal subject matter jurisdiction is equally problematic. The Eighth Circuit's decision resolves important questions regarding federal

question and removal jurisdiction in a manner that is inconsistent with this Court's precedents. If allowed to stand, the Eighth Circuit's decision would enable district courts to split a cause of action between two courts -- one federal, the other state -- with each court adjudicating different elements of that cause of action and with the resolution of the federal questions immune from any federal appellate review.

I. THE EIGHTH CIRCUIT'S DECISION REGARDING APPELLATE JURISDICTION CONTRADICTS THE HOLDINGS OF MULTIPLE CIRCUITS AND CONTRAVENES THIS COURT'S EFFORTS TO PREVENT PIECEMEAL APPEALS

This Court has, on many occasions, noted the evils of piecemeal appellate review and has striven to prevent "the ability of litigants to harass opponents and to clog the courts through a succession of costly and time-consuming appeals." *Flanagan v. United States*, 465 U.S. 259, 264 (1984). *Accord Coopers & Lybrand v. Livesay*, 437 U.S. 463, 467 n. 8 (1978). This Court, however, has not addressed the ability of a plaintiff to use a voluntary dismissal without prejudice pursuant to Fed.R.Civ.P. 41(a) to manufacture an interlocutory appeal over a non-final order.

The courts of appeals that have considered the issue, other than the Eighth Circuit, are unanimous. Consistent with this Court's aversion to piecemeal appeals, they hold that a party cannot use a Rule 41(a) dismissal without prejudice to manufacture an interlocutory appeal. *E.g., Chappelle v. Beacon Comm., Inc.*, 84 F.3d 652 (2d Cir. 1996); *Ryan v. Occidental Petroleum Corp.*, 577 F.2d 298 (5th Cir. 1978); *Horowitz v. Alloy Automotive Co.*, 957 F.2d 1431 (7th Cir. 1992); *Dannenburg v. Software Toolworks, Inc.*, 16 F.3d 1073 (9th Cir. 1994); *Heimann v. Snead*, 133 F.3d 767 (10th Cir.

1998) (citing *Cook v. Rocky Mountain Bank Note Company*, 974 F.2d 147 (10th Cir. 1992)); *State Treasurer v. Barry*, 168 F.3d 8 (11th Cir. 1999) (citing *Mesa v. United States*, 61 F.3d 20 (11th Cir. 1995)).

The reasoning behind these decisions is straightforward and compelling. The starting point is the principle of finality embodied in 28 U.S.C. § 1291, which limits appellate jurisdiction to "final decisions" of the district courts. Equally important are the provisions that specify the discrete circumstances, and the necessary procedures, for interlocutory appeals. One of those provisions is 28 U.S.C. § 1292(b), which permits interlocutory appeals upon appropriate certification by the district court. Another is Fed.R.Civ.P. 54(b), which permits a district court, also upon an appropriate showing, to enter final judgment as to fewer than all the parties or claims in a lawsuit.

In light of these provisions, the six circuits identified above do not allow a plaintiff to manufacture an interlocutory appeal over non-final orders by voluntarily dismissing its remaining claims without prejudice under Rule 41(a). Although an appeal might be appropriate if the plaintiff dismisses its remaining claims *with prejudice* -- for then the orders to be appealed might be deemed to have been final -- that is not the case when the plaintiff dismisses its remaining claims *without prejudice*. As the Second Circuit explained, an appeal following the voluntary dismissal without prejudice of the plaintiff's remaining claims undermines the finality rule and the carefully circumscribed circumstances for interlocutory appeals authorized by Congress in § 1292 and by this Court in Rule 54(b):

> A plaintiff's attempt to appeal a prior adverse determination following the dismissal of his remaining claims without prejudice necessarily implicates the policies of the final judgment rule. Allowing such an appeal following a voluntary dismissal with prejudice . . . furthers the goal of judicial economy by permitting a plaintiff to forgo litigation on the dismissed claims while accepting the risk that if the appeal is unsuccessful, the litigation will end. By contrast, *because a dismissal without prejudice does not preclude another action on the same claims, a plaintiff who is permitted to appeal following a voluntary dismissal without prejudice will effectively have secured an otherwise unavailable interlocutory appeal.*

Chappelle, 84 F.3d at 654.[1]

An especially noteworthy application of this principle is *Fletcher v. Gagosian*, 604 F.3d 637 (9th Cir. 1979). There, as here, the district court entered an order dismissing plaintiffs' claims as to some, but not all, defendants. The district court declined to certify the partial dismissal order pursuant to § 1292(b), and the district court also did not enter final judgment under Rule 54(b) as to the dismissed defendants. Despite the absence of an appealable order, the plaintiffs, like Missouri, filed a notice pursuant to Rule 41(a) dismissing without prejudice the claims against the remaining defendants and then filed a notice of appeal regarding the dismissal order. *Id.* at 638. The Ninth Circuit dismissed the appeal for lack of

---

[1] Emphasis added throughout unless otherwise noted.

appellate jurisdiction, concluding that plaintiffs' gambit was inimical to the orderly administration of justice:

> Moreover, if we accept appellants' rationale, then we also accept the notion that the policies against multiplicity of litigation and against piecemeal appeals may be avoided at the whim of the plaintiff. He need merely dismiss portions of his complaint without prejudice, appeal from what had been an interlocutory order, and refile the dismissed portion as a separate lawsuit.

Id. at 639.

That type of maneuver, the court observed, undermined "procedural order and accuracy" in other ways as well. It impeded the ability to know when a final decision was rendered in the case. That in turn created confusion "in terms of fixing the time when the notice of appeal is filed." *Id.* After all, the Federal Rules of Appellate Procedure require a notice of appeal to be filed within 30 days "after the judgment or order appealed from is entered." Fed.R.App.P. 4(a)(1)(A). If a plaintiff could manufacture an interlocutory appeal over a non-final order through a Rule 41(a) dismissal without prejudice, when would the deadline for the notice of appeal commence? It should not be upon the voluntary dismissal, because that dismissal is not the "judgment or order appealed from." Until the voluntary dismissal occurs, however, the parties and the courts would not know that the earlier non-final order was appealable. And what would happen if the

voluntary dismissal took place more than 30 days after entry of the non-final order sought to be appealed?[2]

The holdings in *Chappelle*, *Fletcher* and the other circuit court decisions cited above are diametrically opposed to the Eighth Circuit's approach. The orders denying Missouri's motion to remand and dismissing the Tribe were undeniably non-appealable interlocutory orders. The district court refused to certify the order denying remand, and Missouri never asked the district court to certify the dismissal order. Nor did Missouri ask the district court to enter final judgment as to the Tribe pursuant to Rule 54(b). Nonetheless, the Eighth Circuit allowed Missouri to appeal both orders by virtue of its Rule 41(a) dismissal without prejudice of UniStar.

In doing so, the Eighth Circuit permitted Missouri to contravene § 1292(b) and Rule 54(b) by obtaining an interlocutory appeal while still litigating its claims. This is plainly demonstrated by the fact that the day after its Rule 41(a) dismissal, and the day before filing its notice of appeal against the Tribe, Missouri reinstated its claim against UniStar in a new lawsuit, just as the court in *Fletcher* warned could happen.

In fact, Missouri went further than the plaintiff in *Fletcher*. Missouri did not merely refile its claim against UniStar. Missouri also effectively refiled its claim against the Tribe. By naming the Tribe's Chairman in his official

---

[2] This is no mere academic question in this case. Missouri took its voluntary dismissal of UniStar some 4 months after the order denying remand and 2 months after the Tribe's dismissal. So assuming Missouri could have created an appeal through a voluntary dismissal of UniStar, the Eighth Circuit still lacked jurisdiction because Missouri filed its notice of appeal more than 30 days after entry of the orders it was attempting to appeal.

capacity as a defendant in the state's second lawsuit, Missouri effectively resued the Tribe. *Kentucky v. Graham*, 473 U.S. 159, 165-66 (1985). As a result, Missouri was simultaneously litigating the same claim before two district courts while pursuing two interlocutory appeals before the Eighth Circuit.

Despite these untoward circumstances, the Eighth Circuit's split with the other circuits was deliberate. As noted in its decision, the Eighth Circuit simply refused to follow the majority rule that prevents a plaintiff from manufacturing interlocutory appeals through a Rule 41(a) dismissal without prejudice. Pet. App. 6a. And the Eighth Circuit has continued to adhere to its contrary position. For example, following its decision in this case, the Eighth Circuit, in yet another split decision, allowed another plaintiff to manufacture a self-help interlocutory appeal in this manner even though the plaintiff was denied a § 1292(b) certification and a Rule 54(b) final judgment. *Great Rivers Cooperative v. Farmland Industries, Inc.*, Eighth Circuit Case Nos. 98-2527, 98-2528 (August 11, 1998 order denying motion to dismiss).

The Eighth Circuit's adherence to this contrarian position is all the more perplexing because the court has offered no valid rationale for doing so. In fact, the majority opinion in this case completely ignored § 1292(b) and Rule 54(b). It instead tried to distinguish the decisions from the other circuits by stating that they involved voluntary dismissals of claims against defendants that were the subject of an interlocutory order dismissing other claims against the same defendants. Pet. App. 5a. The majority, however, offered no principled basis grounded in the language of Rule 41(a) why self-help interlocutory appeals should be tolerated under one circumstance but not the other. There certainly is nothing in the language of Rule 41(a), or § 1292(b) or Rule 54(b) for that matter, that draws the distinction the Eighth Circuit noted.

Similarly unavailing was the majority's observation that Missouri dismissed UniStar by unilateral notice pursuant to Rule 41(a)(1), and not by court order pursuant to Rule 41(a)(2). *Fletcher*, which concerned a dismissal by notice under Rule 41(a)(1), undermines the distinctions the Eighth Circuit attempted to draw. Indeed, it is illogical to say that a plaintiff cannot manufacture an interlocutory appeal by dismissal with court order under Rule 41(a)(2), but can do so by an unilateral notice under Rule 41(a)(1). In the former situation, the district court can be said to have endorsed the plaintiff's efforts to create an interlocutory appeal. If that endorsement is not sufficient to excuse compliance with § 1292(b) or Rule 54(b), it makes no sense to excuse those requirements when plaintiff unilaterally dismisses its claims.

The majority also erroneously suggested that the dismissal of the Tribe might never have been appealable but for Missouri's self-help interlocutory appeal. As Judge Lay noted in his dissent, that is not correct. Pet. App. 16a. The dismissal of the Tribe would have been appealable following the final adjudication of the claim against UniStar. It also might have been appealable sooner if Missouri had availed itself of the procedures under § 1292(b) or Rule 54(b).

Judge Lay, therefore, was quite right in his dissent in stating that the majority's opinion -- which contradicts *Fletcher* and the decisions of five other circuits -- fails to follow the rule of finality, undermines judicial efficiency, and invites multiplicity of lawsuits. Pet. App. 17a-18a. That is what happened in this case, and that is what will continue to happen unless the Eighth Circuit's decision is reversed.

II. THE EIGHTH CIRCUIT'S DECISION REGARDING FEDERAL QUESTION JURISDICTION CONFLICTS WITH THIS COURT'S RULINGS AND THE ORDERLY ADMINISTRATION OF JUSTICE

A. The Standards For Federal Question Jurisdiction

In the seminal case of *Franchise Tax Board v. Construction Laborers Vacation Trust*, 463 U.S. 1 (1983), this Court clarified when a state law claim "arises under" federal law within the meaning of 28 U.S.C. § 1331.[3] As this Court noted, even a cause of action created by state law arises under federal law within the meaning of § 1331 if "the plaintiff's right to relief necessarily depends on resolution of a substantial question of federal law." *Franchise Tax Board*, 463 U.S. at 28. As the Court held:

> Even though state law creates appellant's causes of action, its case might still "arise under" the laws of the United States if a well-pleaded complaint established that its right to relief under state law requires resolution of a substantial question of federal law in dispute between the parties.

---

[3] The fact that this action was removed to federal court is irrelevant to the existence of federal question jurisdiction. Since a case must fall within the original jurisdiction of the federal courts to be removed, 28 U.S.C. § 1441(b), the standards for federal question jurisdiction in removed actions are the same as those in actions originally filed in federal court. *City of Chicago v. International College of Surgeons*, 522 U.S. 156, 118 S.Ct. 523, 529 (1997).

Id. at 13; *accord City of Chicago v. International College of Surgeons*, 522 U.S. 156, 118 S.Ct. 523, 529 (1997); *Merrell Dow Pharmaceuticals, Inc. v. Thompson*, 478 U.S. 804, 808-09 (1986).

The Court also explicated in *Merrell Dow* the considerations that affect whether the federal question presented by a state-law claim is "substantial." As the Court stated, that determination should reflect "the *nature* of the federal issues at stake," 478 U.S. at 814 n.12, with an eye toward whether the exercise of federal judicial power is both appropriate and pragmatic. *Id.* at 813-14. Relevant to that determination is the historical role of the federal courts and the strength of the federal interest in the issue. *E.g., Milan Exp. Co. v. Western Surety Co.*, 886 F.2d 783, 787 (6th Cir. 1989) (finding that Congress' desire to protect motor carriers from fraudulent brokers and the "historical federal interest in the regulation of interstate commerce" justified federal jurisdiction over plaintiff motor carriers' suit to collect on bonds); *Chicago & North Western Transp. Co. v. Atchison, Topeka and Santa Fe Ry*, 609 F.2d 1221, 1224 (7th Cir. 1979) (finding federal jurisdiction over plaintiff's suit to recover costs of de-icing services required by tariff division agreement because federal government had substantial interest in regulating tariff divisions).

Importantly, a plaintiff cannot defeat federal question jurisdiction on this basis by omitting from its complaint the federal question that is a necessary predicate to its right to relief. As the Court has explained, "[i]f a court concludes that a plaintiff has 'artfully pleaded' claims in this fashion, it may uphold removal even though no federal question appears on the face of the plaintiff's complaint." *Rivet v. Regions Bank of Louisiana*, 522 U.S. 470, 118 S. Ct. 921, 925 (1998) (quoting *Franchise Tax Board*, 463 U.S. at 22); *accord Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394, 397 n. 2

(1981) ("courts 'will not permit plaintiff to use artful pleading to close off defendant's right to a federal forum . . . [and] occasionally the removal court will seek to determine whether the real nature of the claim is federal regardless of plaintiff's characterization.'") (quoting 14 Wright & Miller § 3722, pp. 564-66 (1976)).

B. Missouri's Claim "Arises Under" Federal Law

When these standards are applied to Missouri's claim, there can be no legitimate dispute that the claim arises under federal law within the meaning of § 1331. Although nominally couched as a cause under Missouri's Merchandising Practices Act, Missouri's claim necessarily requires the resolution of the substantial federal question whether the National Indian Lottery complies with IGRA. The unique status of Indian tribes under the Constitution, the importance of federal courts in adjudicating controversies involving Indian tribes, and the federal approvals the Tribe received for the National Indian Lottery impart a compelling federal interest to that question, which makes adjudication of Missouri's claim in federal court appropriate.

1. Missouri's Claim Raises A Federal Question

Missouri asserts in its petition that the Tribe has violated the Merchandising Practices Act by allegedly misrepresenting that the National Indian Lottery is "legal" and by failing to inform Missouri residents that their participation therein is "unlawful". Pet. App. 88a-89a. That allegation cannot be true if the National Indian Lottery complies with IGRA. To prevail on its claim, Missouri must establish that the National Indian Lottery violates IGRA. If Missouri fails to prove that point, the Tribe has not falsely represented that the

National Indian Lottery is "legal". Nor has it improperly failed in that event to inform Missouri residents that the game is "unlawful". Missouri's own allegations thus make the National Indian Lottery's non-compliance with IGRA an essential element of Missouri's cause of action.

Missouri, itself, has left no doubt in the course of this litigation that the National Indian Lottery's asserted non-compliance with IGRA is the cornerstone of its action. As the district court noted, Missouri has repeatedly argued that it is entitled to relief because the National Indian Lottery's acceptance of telephone and Internet orders allegedly means that the game is not conducted "on Indian lands" within the meaning of 25 U.S.C. § 2710(d). Pet. App. 21a. Although Missouri never has disputed that the Tribe has received all the required federal approvals for the National Indian Lottery -- approvals that could only be given if the NIGC determined that the National Indian Lottery complies with IGRA -- Missouri has made clear that its claim that the National Indian Lottery is "unlawful" and not "legal" depends on this alleged violation of IGRA.

The district court recognized the centrality of that issue to Missouri's claim, correctly concluding that "the court cannot grant or deny plaintiff the requested relief without reference to [IGRA]" and as a result "there is clearly a federal question present warranting federal jurisdiction." Pet. App. 22a. The district court in Missouri's carbon copy lawsuit in the Eastern District agreed, as did even the Eighth Circuit which acknowledged that the National Indian Lottery's compliance with the "on-Indian lands" requirement of IGRA is "critical" to Missouri's right to relief. Pet. App. 12a.[4]

---

[4] Also instructive is *Wisconsin v. Coeur d'Alene Tribe*, Case No. 97-C-711-5 (W.D. Wis. 1998) (reproduced at Pet. App. 38a-51a). In that case, Wisconsin filed in Wisconsin state court a complaint

(continued . . .)

Missouri's claim, therefore, "is not a case where the underlying right or obligation arises only under state law and federal law is merely alleged as a barrier to its effectuation . . . ." *Oneida Indian Nation of New York v. County of Oneida*, 414 U.S. 661, 675 (1974). Rather, Missouri has no claim at all unless it can prove that the National Indian Lottery is unlawful because the gaming activities are not conducted "on Indian lands" within the meaning of IGRA. Missouri must prove that fact *even if the Tribe never asserts as a defense that IGRA preempts Missouri's claim.* Again, this is so because Missouri cannot prevail in showing that the Tribe falsely represented that the National Indian Lottery is "legal" unless the game violated IGRA.

2. A Strong Federal Interest Exists In The Federal Question Raised By Missouri's Claim

There also can be no doubt that the federal question raised by Missouri's claim is sufficiently substantial to justify adjudication in federal court. Perhaps the best indication of this fact is the Eighth Circuit's instruction to the district court to determine whether the National Indian Lottery complies with any "on Indian lands" requirement under IGRA. Pet. App. 13a. That action bespeaks the Eighth Circuit's own

---

against the Tribe that restated virtually verbatim Missouri's complaint against the Tribe. The Tribe and the other defendants in that lawsuit removed the action to federal court on the same grounds that the Tribe removed Missouri's lawsuit. The district court in that case found that federal question jurisdiction was appropriate given "IGRA's expansive regulation of Indian gaming and the unique federal interest in the regulation of Indian affairs in general . . . ." *Id.* at 1. *See also Forest County Potawatomy Community of Wisconsin v. Doyle*, 803 F. Supp. 1526, 1533 (E.D. Wis. 1992) (holding that federal law is integral to claim that raises issue whether site constitutes "Indian lands" under IGRA).

recognition that the strong federal interest in that question justifies its resolution in federal court.

Those federal interests spring from the Constitution, which vests Congress with exclusive plenary authority over Indian affairs. *E.g., South Dakota v. Yankton Sioux Tribe,* 522 U.S. 329, 118 S. Ct. 789, 798 (1998); *United States v. Sioux Nation of Indians*, 448 U.S. 371, 413 (1980); *Bryan v. Itasca County, Minnesota*, 426 U.S. 373, 376 n.2 (1976); *Morton v. Mancari*, 417 U.S. 535, 551-52 (1974). As the Court recently reiterated in connection with a claim under IGRA, Indian commerce is under the exclusive control of the federal government. *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 62 (1996). This control extends to Indian gaming. *California v. Cabazon Band of Missouri Indians*, 480 U.S. 202 (1987).

In keeping with that distribution of authority, the Court has recognized that federal courts have the primary role in adjudicating claims involving Indian affairs:

> There has been recurring tension between federal and state law; state authorities have not easily accepted the notion that *federal law* and *federal courts* must be deemed the controlling considerations in dealing with the Indians.

Oneida Indian Nation, 414 U.S. at 678 .

Indeed, a long line of this Court's decisions establishes that, unless Congress has affirmatively provided for the exercise of state court jurisdiction, state courts cannot exert jurisdiction over Indian tribes if to do so would "infringe on the right of reservation Indians to make their own laws and be governed by them." *Williams v. Lee*, 358 U.S. 217, 220

(1959); *accord, Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9, 15 (1987); *Fisher v. District Court of Sixteenth Judicial Dist. of Montana*, 424 U.S. 382, 390 (1976); *DeCoteau v. District County Court*, 420 U.S. 425, 429 n. 3 (1975); *see also Littell v. Nakai*, 344 F.2d 486, 490 (9th Cir. 1965) (applying rule of *Williams v. Lee* in case where, though "some of the alleged acts took place [off the reservation]," the matter raised in the lawsuit "was one demanding the exercise of the Tribe's responsibility for self government" and of "intimate concern to the Tribe as a whole").

These authorities confirm the paramount federal interest in the federal question raised by Missouri's claim and the propriety of deciding that question in federal court. Missouri's complaint admits that the National Indian Lottery is a tribal governmental operation, owned by a federally recognized Indian tribe. The Tribe established the game pursuant to official governmental action. Any net revenues from the National Indian Lottery are dedicated, as required by law, to the Tribe's governmental services such as schools and police protection. *See* 25 U.S.C. § 2710(b)(2)(B). Missouri seeks to interfere with that governmental operation via a proceeding directly against the Tribe. Such a claim obviously raises important "issues regarding the interrelation of federal and state authority and the proper management of the federal judicial system," *Franchise Tax Board*, 463 U.S. at 8, in which the federal government has a compelling interest. *See also National Farmers Union Ins. Companies v. Crow Tribe of Indians*, 471 U.S. 845, 850 (1985) (federal question jurisdiction exists over claim that seeks to determine extent of tribal authority over non-members because claim implicates federal plenary authority over Indian tribes).[5]

---

[5] An analogous situation exists for claims that implicate foreign relations and the operations of foreign governments. The area of

(continued . . .)

The pervasive federal interest in tribal affairs, however, is not the only reason why adjudication of Missouri's claim in federal court is appropriate. Adjudication in federal court is also appropriate because Missouri's action is a collateral attack on the federal approvals that the Tribe received for the National Indian Lottery. It is a challenge to federal authority and seeks to impede what the federal agency charged with IGRA's enforcement has authorized. The federal interest in such a proceeding is obvious. The propriety of litigating such a claim in federal court is unassailable, for it clearly would, in the words of *Merrell Dow*, "serve congressional purposes and the federal system." 478 U.S. at 814. *Cf. Forest County Potawatomy Community of Wisconsin v. Norquist*, 45 F.3d 1079, 1083 n.1 (7th Cir. 1994) (tribal-state gaming compact cannot be collaterally attacked in lawsuit).

Indeed, were the Eighth Circuit's decision allowed to stand, the consequences would range far beyond the National Indian Lottery or even the NIGC's approval processes. Under the Eighth Circuit's reasoning, the approval or license of any federal department, agency, commission or board would be subject to collateral attack in state court through the type of

---

international relations is governed by federal law. *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 423-24 (1964); *Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 641 (1981). Where a state-law action has as a substantial element an issue involving foreign relations or foreign policy matters, federal jurisdiction is present. *Republic of Philippines v. Marcos*, 806 F.2d 334, 353 (2d Cir. 1986) (holding that "there is federal question jurisdiction over actions having important foreign policy implications"). The cases addressing this area of federal common law generally involve disputes in which foreign governments are a direct focus of litigation. *See Sabbatino*, 376 U.S. at 404-06; *Republic of Philippines*, 806 F.2d at 353; *Republic of Iraq v. First Nat'l City Bank*, 353 F.2d 47 (2d Cir. 1965). Where an Indian tribe is a direct focus of litigation, the same primary federal interest is present.

artful pleading that Missouri has employed. Federal regulatory approvals would not bring repose, and persons subject to federal regulatory processes could not place confidence in the finality of those proceedings. The compelling federal interest implicated by that situation cannot be gainsaid.

C. Federal Jurisdiction Exists Over Missouri's Entire Claim

Based on this Court's established jurisprudence, the Eighth Circuit should have held that federal question jurisdiction exists over Missouri's entire claim and that the case was removable to federal court. The Eighth Circuit, however, ignored this basis for jurisdiction, stating in a footnote that federal question jurisdiction did not exist on this basis because Missouri's claim was created by state law. Pet. App. 13a. The Eighth Circuit's failure to recognize that the state-law origin of Missouri's claim did not preclude federal question jurisdiction contravened this Court's holdings and the established practice in federal court.

The Eighth Circuit's error is not ameliorated because it instructed the district court to decide whether the National Indian Lottery is conducted "on Indian lands". When a claim arises under federal law, federal jurisdiction exists over the entire claim, not just the federal question that is part of that claim. The claim is not split between federal and state law issues, with only the former removable.

This point is amply demonstrated in *City of Chicago v. International College of Surgeons*, 522 U.S. 156, 118 S.Ct. 523 (1997). In that case, the plaintiff filed a lawsuit in state court that asserted both federal and state law claims arising from a city's denial of a land use permit. The city removed the entire lawsuit on the basis of federal question jurisdiction.

Although some of the plaintiff's claims were pure state-law claims, the Court held that removal of the entire lawsuit was proper. As the Court concluded, the existence of federal question jurisdiction over at least one of plaintiff's claims allowed all of plaintiff's claims in the lawsuit to be removed. *Id.* at 529-33. *Accord Wisconsin Dept. of Corrections v. Schacht*, 118 S. Ct. 2047, 2051 (1998); *Franchise Tax Board*, 463 U.S. at 13 (stating that if any cause alleged in a state complaint arises under federal law, "removal was proper as to the whole case.").

The holding in *International College of Surgeons* stands in stark contrast to what the Eighth Circuit did here. This Court held that removal does not split a lawsuit between multiple federal and state law claims. The Eighth Circuit, however, has countenanced a procedure whereby removal can split a single claim, for adjudication in separate courts, of the federal and state law issues subsumed in that claim. What makes that contrast all the more dramatic is that *International College of Surgeons* involved an appeal of a land use decision -- a matter historically not of great concern to federal courts -- whereas this case involves a collateral attack on a federal license -- a matter of grave federal importance. This contrast only highlights the impropriety of the Eighth Circuit's decision.[6]

---

[6] The Court did recognize in *International College of Surgeons* that the district court might decide, assuming appropriate circumstances existed, to remand the pure state-law claims after it disposed of the federal claims. *See United Mine Workers v. Gibbs*, 383 U.S. 715 (1966). The existence of that discretion, however, in no way diminishes the existence of federal question jurisdiction in the first instance and the defendant's right to remove the entire lawsuit. *International College of Surgeons*, 118 S.Ct. at 533-34; *Merrell Dow*, 478 U.S. at 817 n.15. Nor does it authorize a district court to decide the

(continued . . .)

The contrary course employed by the Eighth Circuit also results in inequitable consequences. For example, Missouri ought to bear the burden of proving that the National Indian Lottery is unlawful, since Missouri alleged that as part of its cause of action. But since the Eighth Circuit has carved out the "on Indian lands" element of Missouri's claim for resolution as part of the motion to remand, the court of appeals has presumably shifted to the Tribe the burden of proof as to the relevant facts. *See Thomson v. Gaskill*, 315 U.S. 442, 446 (1942) (party invoking federal jurisdiction has burden of proving facts necessary to establish jurisdiction).

To make matters worse, the Eighth Circuit's approach would prevent federal appellate review of the federal question that is "critical" to Missouri's claim if the district court were to decide the "on Indian lands" issue against the Tribe and order remand. 28 U.S.C. § 1447(d) (order remanding case to state court is not reviewable on appeal). And assuming the district court once decided the National Indian Lottery did not occur on Indian lands, the state court presumably would refuse to revisit the issue. The Tribe could not appeal through the state system a question the state courts had not decided. The Eighth Circuit's resolution thus renders wholly unreviewable a wholly federal question that is at the heart of Missouri's claim.

In *Merrell Dow*, the Court relied on the fact that appellate review of the federal question inherent in the plaintiff's claim ultimately could be had by this Court to endorse adjudication of that claim in state court. 478 U.S. at 816. That the Eighth Circuit's approach here, by contrast, deprives the Tribe of any federal appellate review of an adverse decision on the federal question inherent in Missouri's

---

federal question that is an element of a single claim and to remand the remaining issues presented by the claim for resolution in state court.

claim highlights the impropriety of the Eighth Circuit's ruling. To prevent this result, the Eighth Circuit had a simple, and correct, alternative that it chose to ignore: hold that federal question jurisdiction exists over Missouri's entire claim, and not just one element of that claim.

CONCLUSION

The Court should grant the petition and reverse the Eighth Circuit's decision. That decision contradicts this Court's established precedents. It also contradicts the holdings of six other courts of appeals.

Respectfully submitted,

Raymond C. Givens
Counsel of Record
GIVENS, FUNKE & WORK
424 Sherman Avenue
Coeur d'Alene, Idaho 83816-0969
(208) 669-5486

Patricia M. Schwarzschild
Michael R. Shebelskie
William H. Wright, Jr.
HUNTON & WILLIAMS
Riverfront Plaza - East Tower
951 East Byrd Street
Richmond, Virginia 23219-4074
(804) 788-8200

Counsel for Coeur d'Alene Tribe

May 14, 1999

TABLE OF CONTENTS
Appendix to the Petition

Opinion,
United States Court of Appeals
for the Eighth Circuit
entered January 6, 1999 ..... 1a

Order,
United States District Court
for the Western District of Missouri
entered September 29, 1997 ..... 19a

Memorandum and Order,
United States District Court
for the Western District of Missouri
entered November 19, 1997 ..... 24a

Memorandum and Order,
United States District Court
for the Eastern District of Missouri
entered February 9, 1998 ..... 31a

Memorandum and Order,
United States District Court
for the Western District of Wisconsin
entered February 18, 1998 ..... 38a

Order,
Denying Petition for Rehearing,
United States Court of Appeals
for the Eighth Circuit
entered February 17, 1999 ..... 52a

Excerpted Statutes 53a

Petition for Injunctive Relief,
Civil Penalties and other Relief
undated..... 77a

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 98-1520

State of Missouri ex rel. Jeremiah W. (Jay) Nixon, Attorney General, Plaintiff- Appellant,	* * * Appeal from * the United * States District * Court for the * Western * District of * Missouri
v.	
Coeur D'Alene Tribe, a federally recognized Indian Tribe; Defendant - Appellee,	

No. 98-1554

State of Missouri ex rel. Jeremiah W. (Jay) Nixon, Attorney General, Plaintiff- Appellant,	* * Appeal from * the United * States District * Court for the * Eastern * District of * Missouri * *
v.	
UniStar Entertainment, Inc.; Executone Information Systems, Inc.; Ernest Stensgar; David Matheson, Defendants - Appellees.	

Submitted: September 21, 1998
Filed: January 6, 1999
Entered: January 6, 1999

Before LOKEN, LAY, and HANSEN, Circuit Judges.

LOKEN, Circuit Judge.

The State of Missouri filed two cases in state court seeking to enjoin the Coeur D'Alene Tribe and its contractor, UniStar Entertainment, Inc. ("UniStar"), from conducting an Internet gambling program known as the National Indian Lottery with Missouri residents. Defendants removed both cases and persuaded both district courts that the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. §§ 2701-2721, completely preempts state regulation of tribal gaming. In the first case, the Western District of Missouri dismissed all claims against the Tribe as barred by the doctrine of tribal immunity. In the second case, the Eastern District of Missouri transferred venue to the Western District of Missouri, denying the State's motion for an immediate preliminary injunction. The State appeals. In the first case, we reject the Tribe's contention that we lack appellate jurisdiction and conclude that the district court improperly defined the preemptive scope of the IGRA in denying the State's motion to remand. We remand that case for reconsideration of subject matter jurisdiction. We dismiss the second appeal for lack of an appealable order.

I. Background and Issues of Appellate Jurisdiction.

The Tribe is federally registered and resides on a reservation in Idaho. The Tribe operates its lottery on the "US Lottery" website pursuant to an IGRA compact with the State of Idaho. See generally 25 U.S.C. § 2710(d); Seminole Tribe v. Florida, 116 S. Ct. 1114, 1119-20 (1996). Computer

users may electronically register to play from their local homes or offices, establish a gambling account funded by charges to their credit cards, and begin gambling once the account is funded. The Tribe offers the lottery to residents of thirty six States who have Internet access. At oral argument, counsel for UniStar argued the US Lottery is lawful nationwide but appellees made the business decision to lower legal costs during start-up by not offering it in States with strong policies against gambling. Apparently, appellees misjudged the legal landscape in Missouri and Wisconsin, two States whose Attorneys General have commenced litigation. Appellees further explained they want to litigate the merits of these cases in a court in Idaho, no doubt because that State has approved the lottery by compact and may stand to profit from its nationwide revenues if non-consenting States like Missouri can be ignored.

The State of Missouri first sued the Tribe and UniStar in a state court in the Western District, seeking to enjoin operation of the lottery because Internet gambling is illegal in Missouri and therefore the Tribe is violating state law by offering unlawful services and falsely advertising that the lottery is legal in Missouri. See Mo. Rev. Stat. §§ 407.020, 407.100. Defendants removed to the Western District, claiming complete IGRA preemption. The State moved to remand, arguing the US Lottery is not gambling on "Indian lands" within the meaning of 25 U.S.C. § 2703(4) and therefore is not within the scope of IGRA preemption. The Tribe and UniStar moved to dismiss for failure to state a claim, arguing tribal immunity. Relying on our decision in Gaming Corporation of America v. Dorsey & Whitney, 88 F.3d 536, 543 (8th Cir. 1996), the district court denied the motion to remand, concluding the IGRA completely preempts the field of Indian gaming regardless of whether the gaming occurs on Indian lands. The court declined to certify that issue for interlocutory appeal. It then granted the Tribe's motion to dismiss all claims against the Tribe as

barred by tribal immunity but denied UniStar's motion to dismiss, leaving open the question whether tribal immunity extends to tribal agents such as UniStar.

In January 1998, the State voluntarily dismissed its claims against UniStar without prejudice under Rule 41(a)(1)(i) of the Federal Rules of Civil Procedure. The State then appealed the district court's orders refusing to remand and dismissing all claims against the Tribe as now-final orders. Seeking to block the appeal, UniStar asked the Western District to hold the voluntary dismissal of UniStar "ineffective and void." On July 2, 1998, with the State's appeal pending, the district court granted UniStar's motion, concluding the State could not voluntarily dismiss UniStar without leave of court, which the district court refused to grant. The Tribe immediately moved this court to amend its pending motion to dismiss the appeal to incorporate this latest district court ruling. We grant the motion to amend.

Meanwhile, after voluntarily dismissing UniStar in the first case, the State sued UniStar and two tribal leaders in a state court in the Eastern District, alleging the same violations of state law. Defendants removed that case to the Eastern District. The State moved to remand or, alternatively, for a preliminary injunction. Defendants countered with a motion to transfer the case to a district court in Idaho or to the Western District of Missouri. In a single order, the district court denied the State's motion to remand, transferred the case to the Western District to "preserve judicial economy," and denied the State's motion for a preliminary injunction without further comment. The State appeals that order.

This rather tangled procedural history presents us with the following questions of appellate jurisdiction. In the first case, the order dismissing all claims against the Tribe was not appealable when entered because UniStar remained in the case, and there was no Rule 54(b) determination permitting immediate appeal of the order finally dismissing

the Tribe. The issue is whether the State's unilateral Rule 41(a)(1)(i) dismissal of UniStar without prejudice made the order dismissing the Tribe (and the earlier order refusing to remand) immediately appealable. There are two subparts to that issue -- whether a Rule 41(a)(1)(i) dismissal will normally have this effect, and if so, whether the district court's subsequent invalidation of the State's voluntary dismissal divested this court of jurisdiction. In the second case, the issue is whether the district court's interlocutory order transferring the case and denying a preliminary injunction is an appealable order "refusing [an] injunction" under 28 U.S.C. § 1292(a)(1). We will address these issues of appellate jurisdiction and then consider the question of subject matter jurisdiction under IGRA.

A. Appellate Jurisdiction in the First Case.

1. The Effect of a Voluntary Dismissal Without Prejudice. The Tribe argues that a voluntary dismissal without prejudice of a remaining defendant under Rule 41(a)(1)(i) does not render a previous order finally dismissing other defendants immediately appealable. We disagree. First, we note that this contention presumes the case has ended in the district court, yet the Tribe offers no suggestion as to when the order dismissing it *would be* appealable. In other words, the Tribe seeks the windfall of complete freedom from appellate review because the State failed to dismiss UniStar with prejudice. A less equitable position is hard to imagine.

Second, the Tribe relies primarily upon cases from other circuits holding that a voluntary dismissal of the claims pending against a defendant must be with prejudice to render final and appealable a previous order dismissing other claims *against the same defendant*. See Chappelle v. Beacon Commun. Corp., 84 F.3d 652, 654 (2d Cir. 1996); Horwitz v. Alloy Automotive Co., 957 F.2d 1431, 1435-36 (7th Cir.

1992). But see Division 241 Amalgamated Transit Union v. Suscy, 538 F.2d 1264 (7th Cir.), cert. denied, 429 U.S. 1029 (1976). These cases further the well-entrenched policy that bars a plaintiff from splitting its claims against a defendant. But this policy does not extend to requiring a plaintiff to join multiple defendants in a single lawsuit, so the policy is not violated when a plaintiff "unjoins" multiple defendants through a voluntary dismissal without prejudice. See 8 MOORE'S FEDERAL PRACTICE ¶ 41.33[8][g][i] (3d ed. 1998). Moreover, our court has never adopted the rule applied in Chappelle and Horwitz. Indeed, in Chrysler Motors Corp. v. Thomas Auto Co., 939 F.2d 538 (8th Cir. 1991), we upheld appellate jurisdiction after the parties agreed to dismiss *without prejudice* the only claims remaining against the defendant.

In Johnston v. Cartwright, 344 F.2d 773, 774 (8th Cir. 1965), plaintiff appealed the dismissal of one defendant after voluntarily dismissing the remaining two defendants without prejudice by court order under Rule 41(a)(2). We held the dismissal order became final and appealable when the other defendants were voluntarily dismissed from the lawsuit. The Tribe's contention that Johnston should not apply equally to voluntary dismissals as of right under Rule 41(a)(l)(i) is unpersuasive. Either type of voluntary dismissal leaves the action in the same posture as if suit had never been brought against the dismissed defendant.[1]

---

[1] The Tribe also argues the appeal was untimely because it was not filed within 30 days of the order dismissing the Tribe. This contention is without merit. The State filed its notice of appeal two days after voluntarily dismissing UniStar, the event that made the prior order final and appealable. See Hicks v. NLO, Inc., 825 F.2d 118, 120 (6th Cir. 1987).

2. Did the District Court's Order Invalidate the State's Voluntary Dismissal? Having concluded a Rule 41(a)(1)(i) dismissal normally makes a prior interlocutory dismissal order final and appealable, we must determine whether the district court's order properly invalidated the State's voluntary dismissal. A voluntary dismissal under Rule 41(a)(1)(i) must be filed "before service by the adverse party of an answer or of a motion for summary judgment." Here, UniStar's Rule 12(b)(6) motion papers included matters outside the State's pleading, namely, copies of the Tribal Code and US Lottery Internet pages stating tribal sovereign immunity was not waived. Long after it ruled on the motion, the district court concluded this automatically converted the motion to one for summary judgment, and it declared the State's voluntary dismissal untimely and invalid. The Tribe argues we have no jurisdiction because the State's claims against UniStar are therefore still pending.

The problem with this contention is that the district court took its action after the State filed its notice of appeal. Once a notice of appeal is filed, the district court is divested of jurisdiction over matters on appeal. See Griggs v. Provident Consumer Discount Co., 459 U.S. 56, 58 (1982); Liddell v. Board of Educ., 73 F.3d 819, 822 (8th Cir. 1996). For example, while an appeal is pending, the district court may not reexamine or supplement the order being appealed. See 20 MOORE'S FEDERAL PRACTICE § 303.32[2][a][ii] & n.15. This jurisdictional principle is not absolute. To prevent parties from using frivolous appeals to delay or interrupt proceedings in the district court, that court does not normally lose jurisdiction to proceed with the case when one party appeals a non-appealable order. Id. at § 303.32[2][b][iv][B] & cases cited. However, appellate jurisdiction is primarily an issue for the appellate court. Therefore, if an appeal is taken from an interlocutory order and the issue of appealability is in doubt, the district court should stay its hand until we resolve the issue of our

jurisdiction, or remand for further clarification of that issue. See Johnson v. Hay, 931 F.2d 456, 459 n.2 (8th Cir. 1991).

In this case, the district court did not treat the Rule 12(b)(6) motions as motions for summary judgment nor give both parties the opportunity to present additional summary judgment materials, as Rule 12(b) requires. On appeal, no party suggests the district court improperly relied upon disputed factual matters outside the pleadings in granting the Tribe's motion to dismiss -- the State challenges the ruling on the merits, and the Tribe simply wants to recast the ruling so as to deprive us of jurisdiction.[2] In this circuit, Rule 12(b)(6) motions are not automatically converted into motions for summary judgment simply because one party submits additional matters in support of or opposition to the motion. See Martin v. Sargent, 780 F.2d 1334, 1336-37 (8th Cir. 1985). Some materials that are part of the public record or do not contradict the complaint may be considered by a court in deciding a Rule 12(b)(6) motion to dismiss. See Papsan v. Allain, 478 U.S. 265, 268 n.1 (1986); Hollis v. United States Dep't of Army, 856 F.2d 1541, 1543-44 (D.C. Cir. 1988). Thus, when filed, the State's Rule 41(a)(1)(i) voluntary dismissal of UniStar was facially valid.

The State's facially valid voluntary dismissal of UniStar gave this court apparent jurisdiction over the State's appeal from the prior orders dismissing the Tribe and refusing to remand. The question of appellate jurisdiction is

---

[2] On this basis we distinguish cases in which the principal issue on appeal was whether the district court erred in not converting a Rule 12(b)(6) motion and giving the losing party a reasonable opportunity to develop an adequate summary judgment record. See, e.g., Gibb v. Scott, 958 F.2d 814, 816 (8th Cir. 1992); Woods v. Dugan, 660 F.2d 379, 380 (8th Cir. 1981).

fundamental to an appeal.[3] If the Tribe or UniStar wished to challenge the validity of the Rule 41(a)(1)(i) voluntary dismissal, they should have come to this court, not the district court, asking us to dismiss the appeal, or to remand if they believed that clarification from the district court would be helpful. Therefore, the district court's July 1998 order purporting to recast its prior dismissal order so as to divest this court of appellate jurisdiction was beyond the district court's jurisdiction and is void. The Tribe asserts no other basis for its challenge to our jurisdiction, and the State's voluntary dismissal is facially valid. Therefore, the Tribe's motion and amended motion to dismiss the State's appeal in the first case are denied.

B. Appellate Jurisdiction in the Second Case.

Defendants argue we have no jurisdiction over the second appeal because the district court did not rule on the merits of the State's preliminary injunction motion but simply transferred venue in the case to the Western District. We agree. The merits of the State's request for a preliminary injunction were not addressed at the motion hearing. Several times during that hearing, the court advised the State it could raise the preliminary injunction issue after transfer to the Western District. At the end of the hearing, the court explained, "the transfer is really the basis of everything." Although the court's written order recited that the State's request for a preliminary injunction was denied, it contained

---

[3] On the other hand, we have held that a district court retains jurisdiction over collateral matters, such as attorney's fees or sanctions, while an appeal is pending. See Gundacker v. Unisys Corp., 151 F.3d 842, 848 (8th Cir. 1998); Harmon v. United States, 101 F.3d 574, 587 (8th Cir. 1996).

no findings of fact and conclusions of law supporting the denial of an injunction, as Rule 52 requires. We conclude the court intended simply to transfer a pending injunction motion, not to deny an injunction on the merits. Therefore, its transfer order is not appealable under 28 U.S.C. § 1292(a)(1). See Liddell v. Board of Educ., 105 F.3d 1208, 1212 (8th Cir. 1997); Rodgers v. United States Steel Corp., 541 F.2d 365, 372 (3d Cir. 1976). It is well-settled that an interlocutory order transferring venue is not otherwise appealable. See United States Fire Ins. Co. v. American Family Life Assur. Co., 787 F.2d 438 (8th Cir. 1986).

II. Subject Matter Jurisdiction and the IGRA.

The State argues the district court lacks subject matter jurisdiction and therefore erred in denying the State's motion to remand. A case may be removed only if it could be brought in federal court originally. See 28 U.S.C. § 1441(a). "Absent diversity of citizenship . . . federal jurisdiction exists only when a federal question is presented on the face of the plaintiff's properly pleaded complaint." Caterpillar, Inc. v. Williams, 482 U.S. 386, 392 (1987). Normally, the presence of a federal defense such as IGRA preemption will not support removal, even if the federal defense is the only contested issue in the case. However, when a federal statute has "preempt[ed] a field of law so completely that state law claims are considered to be converted into federal causes of action," then an action purporting to plead preempted state law claims is removable. Dorsey, 88 F.3d at 543. The question here, as in Dorsey, is whether the IGRA has this "extraordinary preemptive power" to completely preempt the state law claims at issue. We review these jurisdictional issues de novo. See United States v. Thunder Hawk, 127 F.3d 705, 706 (8th Cir. 1997).

In Dorsey, casino management companies sued a Twin Cities law firm, asserting state law claims such as fraud and breach of fiduciary duty arising out of the parties' conduct during the licensing of a tribal casino on Indian lands in Wisconsin. The law firm removed, claiming complete IGRA preemption. The district court remanded the entire case to state court, and we reversed. After reviewing the IGRA's language and legislative history under the Supreme Court's complete preemption precedents, we concluded that Congress had completely preempted the field of regulating gaming activities on Indian lands. See 88 F.3d at 542-48. We then examined the specific state law claims at issue to see whether they fell within the preemptive scope of the IGRA. We concluded that at least some of the claims were preempted because they potentially interfered with the Tribe's casino licensing process, a process mandated and regulated by the IGRA. The district court had erred in remanding those preempted claims.

In this case, the district court denied the State's motion to remand without deciding whether the Tribe's internet lottery is conducted "on Indian lands." The court gave two reasons for this decision -- because the Indian lands issue is a question of federal law "warranting federal jurisdiction," and because the court construed our opinion in Dorsey as extending IGRA complete preemption to include all claims which may interfere with tribal governance of gaming. We disagree.

As our opinion in Dorsey explained at length, the IGRA established a comprehensive regulatory regime for tribal gaming activities on Indian lands. Both the language of the statute and its legislative history refer only to gaming on Indian lands. See, e.g., 25 U.S.C. § 2701; S. Rep. No. 100-446, reprinted in 1988 U.S.C.C.A.N. 3071, 3071-3083. The Indians' long-standing rights and interests in controlling activities on their tribal lands, and the States' correspondingly limited power to regulate activities on tribal

lands except as authorized by Congress, are core principles underlying the IGRA that necessarily frame the scope of its preemptive force. See generally California v. Cabazon Band of Mission Indians, 480 U.S. 202 (1987) (the Supreme Court decision to which Congress responded in IGRA). Our conclusion in Dorsey that the IGRA preempted claims interfering with tribal gaming must be viewed in the context of an IGRA-regulated licensing of casino gaming that was indisputably conducted solely on Indian lands. In our view, the district court's reasoning simply proves too much. Once a tribe leaves its own lands and conducts gambling activities on state lands, nothing in the IGRA suggests that Congress intended to preempt the State's historic right to regulate this controversial class of economic activities. For example, if the State of Missouri sought an injunction against the Tribe conducting an internet lottery from a Kansas City hotel room, or a floating crap game in the streets of St. Louis, the IGRA should not completely preempt such a law enforcement action simply because the injunction might "interfere with tribal governance of gaming."

Placed in proper perspective, we think the issue whether the Tribe's lottery is conducted "on Indian lands" is critical to whether the State's claims fall within the preemptive force of the IGRA, which in turn determines whether the district court has subject matter jurisdiction over the removed action. The on-Indian-lands question is one of federal law, but its *unresolved* presence is not enough to confer federal subject matter jurisdiction over the entire case. If the Tribe's lottery is being conducted on its lands, then the IGRA completely preempts the State's attempt to regulate or prohibit. See 25 U.S.C. § 2710(d)(1). But if the lottery is being conducted on Missouri lands, the IGRA does not preempt the state law claims -- indeed, it does not even

appear to provide a federal defense -- and the case must be remanded to state court.[4]

Accordingly, in case No. 98-1520, the district court's orders of September 29, 1997, and November 19, 1997, are vacated, and the case is remanded to the Western District of Missouri for further proceedings not inconsistent with this opinion. On remand, the court must initially determine whether the Tribe's internet lottery is a gaming activity on Indian lands of the Tribe. See 25 U.S.C. §§ 2702(3), 2710(d). If the court concludes the lottery is not conducted on Indian lands when a participant plays from a computer located in Missouri, it must grant the State's motion to remand, and the issue of tribal sovereignty will be decided in the first instance by the state courts.[5]

---

[4] The Tribe's contention that the district court has jurisdiction under the "artful pleading" exception to the well-pleaded complaint rule is without merit. Under this exception, federal courts have subject matter jurisdiction over purported state law claims if the plaintiff failed to plead a federal right or immunity that is an essential element of the plaintiff's cause of action. However, the State's claims against the Tribe arise solely from state law. The federal question at issue involves the federal defense of IGRA preemption. See Franchise Tax Bd. v. Construction Laborers Vacation Trust, 463 U.S. 1, 10-12 (1983).

[5] See AT&T Corp. v. Coeur d'Alene Tribe, No. CV97-392-N-EJL (D. Idaho Dec. 17, 1998) (IGRA preemption limited to gaming on Indian lands; the Tribe's lottery is not on Indian lands when the wager is placed by telephone from off the reservation). We further note that in the criminal statute prohibiting interstate wagering by wire, Congress's limited exemption for lawful gambling requires that the betting be legal in the State from which the bettor places a call. See 18 U.S.C. § 1084(b). Proposed legislation to expand this statute to include internet gambling has a similarly limited exemption. See Internet Gambling Prohibition Act, S. 474 and H.R. 2380, § 3(b)(1), 105th Cong. (1997). We also note that Congress in enacting the IGRA recognized that States have "significant governmental interests" in Indian gaming,

(continued . . .)

In case No. 98-1554, we dismiss file appeal for lack of jurisdiction. The State's motion to strike a portion of the defendants' brief and the defendants' motions to file a supplemental appendix and to supplement the record on appeal are denied as moot.

LAY, Circuit Judge, concurring in part and dissenting in part.

I would hold that this court lacks appellate jurisdiction in both of these cases. I do so on the ground that there exists no final order in either case. The majority finds that a final order exists and concludes that the district court erroneously defined the preemptive scope of IGRA in denying the state's motion to remand. I respectfully submit that this case is extremely important in this circuit because of the failure to follow the rule of finality which governs appeals in federal courts.

In the district court, in the first appeal, the Tribe and Unistar moved to dismiss for failure to state a claim on the grounds of tribal immunity. The State of Missouri moved to remand. The district court denied the motion to remand concluding IRGA provided complete preemption in the field of Indian gaming regardless of whether the gaming occurs on Indian land. The district court refused to certify that issue for interlocutory appeal. The district court then granted the Tribe's motion to dismiss all claims against the Tribe as

---

including "the State's public policy, safety, law and other interests [such as] raising revenue for its citizens." S. Rep. No. 100-446, reprinted in 1988 U.S.C.C.A.N. at 3083. For a review of the checkered legal history of lotteries in Missouri and elsewhere, see Tichenor v. Missouri State Lottery Comm'n, 742 S.W.2d 170, 179-81 (Mo. banc 1988) (Welliver, J., dissenting).

barred by tribal immunity but denied Unistar's motion to dismiss. In January, 1998, the state then voluntarily dismissed all of its claims against Unistar without prejudice under Fed. R. Civ. P. 41(a)(1)(i).[6] The state then appealed. Thereafter, on July 2, 1998, notwithstanding the state's pending appeal, the district court concluded that the state could not voluntarily dismiss Unistar without leave of court. The Tribe then moved in this court to amend its pending motion to dismiss this court. The Tribe then moved in this court to amend its pending motion to dismiss this appeal to incorporate the district court's ruling.

As the majority points out, after the state voluntarily dismissed Unistar in the first case, it sued Unistar and two Tribal leaders in a state court in the Eastern District of Missouri alleging the same violations of state law. This case was then removed to the Eastern District of Missouri. The district court transferred this case to the Western District of Missouri and denied the state's motion to remand. The state has now appealed that order. I concur with the majority that we lack appellate jurisdiction to review that case.

In the first case, notwithstanding the fact there was no Federal Rule of Civil Procedure Rule 54(b) determination

---

[6] Rule 41(a)(1)(i) reads in relevant part as follows:

> an action may be dismissed by the plaintiff without order of court (i) by filing a notice of dismissal at any time before service by the adverse party of an answer or of a motion for summary judgment, whichever first occurs . . . . Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice. .
>
> Fed. R. Civ. P. 41(a)(1)(i).

permitting immediate appeal of the order dismissing the Tribe, this court now finds the state's unilateral dismissal of Unistar without prejudice made the order dismissing the Tribe immediately appealable.

In finding that we have appellate jurisdiction over the state's appeal, the court creates an anomalous rule under the facts of this case. First, the majority is concerned that if the Tribe's dismissal is not immediately appealable, it will create a "windfall of complete freedom from appellate review." The majority urges "[a] less equitable position is hard to imagine." This reasoning is a complete non sequitur. The situation with which we deal is no different than any other interlocutory ruling where all orders must wait until there is a final judgment as to all parties and all claims. In cases where certification is denied under Rule 54(b), the mere fact that one or more parties is not affected by a dismissal of a co-defendant does not immunize the case from appellate review. This case is no different.

The primary issue that we face is whether Unistar's motion to dismiss on the ground of tribal immunity constituted a motion for summary judgment. If it did, it should be clear that a voluntary dismissal of Unistar could not be effected under Rule conditions as the court deems proper. The majority opinion deals at length with the fact that the district court was without jurisdiction to hold that Unistar's 12(b)(6) motion papers constituted summary judgment. The majority faults the district court for lack of jurisdiction in so ruling after the state had filed its notice of appeal. On this basis, the majority finds the state's Rule 41(a)(1)(i) voluntary dismissal of Unistar was facially valid.

I see the belated order of the district court as being a non-issue in this case. Assuming that the district court had no jurisdiction to act, the fundamental issue of whether the appeal by the state is a final order is an issue for this court, and whatever the district court ruled is immaterial to deciding our own appellate jurisdiction. This court must

independently determine whether there is a final order to support our jurisdiction and such determination must be made whether the parties raised the issue or not. In the present case, it is clear that Unistar's 12(b)(6) motion included matters outside the state's pleadings. A true test of whether a motion to dismiss involves matters outside the pleadings so as to convert the motion into a summary judgment is whether or not extrinsic facts are introduced into the record.[7]

In the present case, the majority holds that the district court did not treat the 12(b)(6) motion as a motion for summary judgment. Yet, the record contains Judge Sachs' statement (albeit belated) that he did consider excerpts attached to Unistar's motion from the Coeur D'Alene Tribal Code as well as excerpts from the rules and regulations of the U.S. Lottery. These exhibits contain factual information outside the pleadings. Although Judge Sachs' order in July is not relevant to our decision, it is difficult to ignore an experienced judge's averment that he did consider these extrinsic facts when passing on the motion to dismiss.

Rules of finality governing orders on appeal are essential to the judicial efficiency of appellate jurisdiction. Rule 41(a)(1)(i) is designed to allow voluntary dismissals where the trial proceedings have not progressed to a stage where a defendant has answered or filed a motion for summary judgment. Obvious reasons of judicial efficiency

---

[7] Judge Loken relies on Martin v. Sargent, 780 F.2d 1334, 1336-37 (8th Cir. 1985), to support his theory that simply because additional materials are filed in support or opposition to the motion, this does not automatically convert the motion to one for summary judgment. This case is clearly distinguishable. In Martin the parties did not even bother to file the additional evidence with its motion. The other cases cited by Judge Loken are not relevant to the issue involved.

support this rule. However, in addition, the rule serves to avoid multiplicity of lawsuits against a defendant. Here, the state's obvious strategy was to obviate the final judgment rule by filing a voluntary dismissal and then refiling against the dismissed party the next day. If the majority's rule becomes precedent, we simply invite a means to circumvent established rules governing review of final orders.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

STATE OF MISSOURI, ex rel.	)	
JEREMIAH W. (JAY) NIXON,	)	
Plaintiff,	)	
v.	)	No. 97-0914-CV-W-6
	)	
COEUR D'ALENE TRIBE, et al.,	)	
Defendants.	)	

Entered: September 29, 1997

ORDER

This matter comes before the court on a number of pending motions. Defendants have moved the court to amend their notice of removal, to dismiss the above-captioned case for lack of jurisdiction, and to dismiss this case for failure to state a claim upon which relief can be granted. Plaintiff has moved the court to remand the present action to state court and to stay plaintiff's obligation to respond to defendants' motions to dismiss until the motion to remand is ruled.

Plaintiff has not objected to defendants' request to amend its notice of removal. Accordingly, defendants' motion will be granted.

Plaintiff, which initially brought this case in Missouri state court, maintains that this court lacks subject matter jurisdiction over the present case and that, consequently, the case should be remanded to state court. Plaintiff first contends that no diversity jurisdiction exists and that there is no federal question presented on the face of its Complaint. Accordingly, plaintiff argues, the well-pleaded complaint rule precludes removal of this claim to federal court.

Defendants, who have attempted to remove this case, contend that the case presents an exception to the well-pleaded complaint rule because plaintiff's claims are completely preempted by the Indian Gaming Regulatory Act, 25 U.S.C. S 2701, et seq. (the Act). The Act, enacted in 1988, is the statutory basis for the operation and regulation of gaming by Indian tribes.

Under the well-pleaded complaint rule, a plaintiff can generally avoid removal to federal court by alleging solely state law claims in its Complaint. Caterpillar Inc. V. Williams, 482 U.S. 386, 392 (1987). A federal defense, including the defense that plaintiff's claims are preempted by federal law, cannot provide a basis for removal. Id. at 393. An exception to this rule is the doctrine of "complete preemption." Under this doctrine, a federal court has jurisdiction over a complaint that alleges only state causes of action if Congress clearly intended that a federal statute completely preempt the field of law at issue. Metropolitan Life insurance Co. v. Taylor, 481 U.S. 58, 65 (1987). Even when complete preemption applies, not all state law claims are necessarily covered and only those claims that fall within the preemptive scope of the particular statute are considered to serve as federal questions. Gaming Corp. of America v. Dorsey & Whitney, 88 F.3d 536, 543 (8th Cir. 1996). Accordingly, because plaintiff's Complaint alleges only violations of state consumer protection law, this court will lack jurisdiction unless plaintiff's claims are completely preempted.

Defendants, as the parties seeking removal, bear the burden of establishing that this court has jurisdiction over the present action. In re Business Men's Assurance Co. Of America, 992 F.2d 181, 183 (8th Cir. 1993). The court must resolve all doubts about federal jurisdiction in favor of remand. Id.

In Dorsey & Whitney, the Eighth circuit examined the text and legislative history of the Indian Gaming

Regulatory Act and concluded that the Act completely preempts the field in the regulation of gaming activities on Indian lands. Id. at 544-547. In so deciding, the Court looked to traditional notions of Indian sovereignty and the long history of Supreme Court cases affirming that Indian commerce is under the exclusive control of the federal government. Id. at 547-8. In determining the preemptive scope of the Act, the Circuit stated that "[t]he key question is whether a particular claim will interfere with tribal governance of gaming." Id. at 549. The Court also noted that, due to unique federal and tribal interests, a less stringent test is applied when preemption is asserted as a defense in cases involving Indian affairs. Id. at 548.

The parties have not cited, and the court is not aware of, any cases in which an Indian tribe broadcast its gaming activities beyond the traditional geographical scope of Indian land. Plaintiff argues that the Act is clearly inapplicable to this case, and that its cause of action is consequently not preempted, because the gambling at issue does not take place "on Indian lands." It is true that the gamblers in Missouri place their bets from locations not on Indian land; it is also the case that the Tribe's web site for the Internet lottery is maintained on and operated from a computer located on tribal lands. The defendants accordingly contend that the lottery does take place on Indian lands and is thus covered by the Act. Defendants also contend that the Tribe's authority to engage in the Internet gaming in the first instance arises from the Act. See Oneida Indian Nation of New York State v. County of Oneida, 414 U.S. 661 (1974) (where tribe's right to possession of land was claimed to arise under federal law in the first instance, construction of federal law was necessary and thus claim concerning land rights presented federal question). Contrary to plaintiff's contentions, the question of whether the Tribe's lottery takes place on Indian lands is a question of law - federal law - to be determined by the court. Because the court cannot grant or deny plaintiff

the requested relief without reference to the Act, and even assuming defendants are arguing a strained construction of the federal legislation--which may very well not contemplate broadcasting beyond Indian Territory--there is clearly a federal question present warranting federal jurisdiction.

The preemptive scope of the Act, as determined by the Circuit, also indicates that a federal question is present here. Plaintiff seeks a permanent injunction preventing the tribe from continuing to allow Missouri residents access to its lottery web site. Any determination in this case will arguably "interfere with tribal governance of gaming."

The facts of Dorsey & Whitney additionally indicate that this case is completely preempted by the Act. In Dorsey & Whitney, two casino management corporations brought an action against an Indian tribe's law firm alleging that the firm had violated state law while representing the tribe during a tribal casino management licensing process. The facts of the case only indirectly implicated the gaming licensing process authorized by the Act. Even though the tribe was not a party to the litigation, the court concluded that the tribe had a recognized interest in connection with parties with whom it deals in relation to gaming and that this indirect connection to the Act was sufficient to completely preempt the claims. It was enough that "[i]nquiry into [the law firm's] performance of its duty to the nation could threaten the tribe's legitimate interests, question to correctness of its licensing decisions, and risk influencing how counsel could serve tribes in the future." Id. at 550.

Plaintiff also contends that this case should be remanded because removal violates the Eleventh Amendment. Plaintiff argues that the Eleventh Amendment prohibits removal to federal court of cases where the state is a party without the state's consent. Plaintiff's argument is against the weight of established Supreme Court precedent and the language of the Eleventh Amendment itself. See Illinois v. City of Milwaukee, 406 U.S. 91, 100-101 (1972);

Ames V. Kansas, 111 U.S. 449, 470 (1884). Where a federal question is presented, as is the case here, the Eleventh Amendment does not bar removal of an action in which a state is the plaintiff.

Plaintiff has additionally moved the court to stay its obligation to respond to defendants' motions to dismiss until the issue of remand had been ruled. Because plaintiff's briefs are, at this point, well overdue and because plaintiff should not be penalized for the court's failure to rule on its motion earlier, plaintiff's motion to stay will be granted. The court will withhold ruling on defendants' motions to dismiss until plaintiff has filed its opposition.

For the foregoing reasons, it is hereby

ORDERED that defendants' Motion to Amend Notice of Removal (Doc. 8) is GRANTED. It is further

ORDERED that plaintiff's Motion to Remand Action to State Court (Doc. 14) is DENIED. It is further

ORDERED that plaintiff's Motion to Stay Plaintiff's Obligation to Respond to Defendants' Motions to Dismiss Until Plaintiff's Motion to Remand is Ruled (Doc. 16) is GRANTED. Plaintiff should respond to defendants' motions to dismiss within twelve (12) days from the date of this order.

/s/ Howard F. Sachs
HOWARD F. SACHS
UNITED STATES DISTRICT JUDGE

Dated: September 29, 1997.

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

STATE OF MISSOURI, ex rel. JEREMIAH W. (JAY) NIXON, Plaintiff,	)
v.	) No. 97-0914-CV-W-6
COEUR D'ALENE TRIBE, et al., Defendants.	)

Entered: November 19, 1997

MEMORANDUM AND ORDER

Currently before the court are Plaintiff's Motion to Amend Order Denying Motion to Remand to Certify it for Interlocutory Appeal and Defendants' Motion to Dismiss for Failure to State Claim.

Motion to Certify for Interlocutory Appeal

On September 29, 1997, the court declined to remand this action to state court. Plaintiff has subsequently moved the court to certify this order for interlocutory appeal. 28 U.S.C. § 1292(b) provides that, in order to certify a ruling for appeal, a district court must be of the opinion that the order "involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation." Section 1292(b) should be used sparingly, and movants bear the heavy burden of demonstrating that their case is an exceptional one in which immediate appeal is warranted. White v. Nix, 43 F.3d

374, 376 (8th Cir. 1994). Plaintiff has failed to meet this burden.

In its motion for certification, plaintiff asserts that there is a substantial ground for difference of opinion as to whether plaintiff's claims are completely preempted by the IGRA. In support of this contention, plaintiff sets forth a number of arguments relating to whether defendants' Internet lottery takes place on Indian lands, and is thus covered by the scope of the Act. The court agrees that there is a legitimate dispute as to whether the lottery takes place on tribal lands. It does not follow, however, that there is ground for difference of opinion regarding whether the Act preempts plaintiff's claims such that this court correctly maintained subject matter jurisdiction. Whether plaintiff's claims are completely preempted is a question distinct from whether the IGRA will ultimately govern the determination to be made in this case. Although the IGRA may not apply to this case, because a court, before looking at the merits of plaintiff's claims, must determine whether or not the defendants' lottery is played on Indian lands and thus within the scope of the Act, there is necessarily a federal question present warranting federal jurisdiction. The Eighth Circuit has held in no uncertain terms that the preemptive scope of the IGRA is quite broad, covering all claims which may "interfere with tribal governance of gaming." Gaming Corp. of America v. Dorsey & Whitney, 88 F.3d 536, 543 (8th Cir. 1996). It is not necessary that the IGRA actually be determinative of the merits of the claim. Accordingly, plaintiff's motion for certification to appeal will be denied.[1]

---

[1] In any event the motion to dismiss is of great significance and is ready for ruling.

Motion to Dismiss for Failure to State a Claim

Although the court has federal question jurisdiction over this litigation, there exists the additional jurisdictional issue of whether Missouri's suit is barred by the tribe's sovereign immunity. It is well-established that Indian tribes possess common-law immunity from suit. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 58 (1978). Suits against an Indian tribe are consequently barred unless there has been a clear waiver by the tribe or congressional abrogation. Oklahoma Tax Comm'n v. Potawatomi Indian Tribe, 498 U.S. 505, 509 (1991). But see p. 514, leaving open the application of Ex parte Young, 209 U.S. 123 (1908) to the State law claim.

In this case, it is clear that the tribe has not expressly waived its sovereign immunity. The Tribe's Code asserts that the tribe maintains immunity from legal action; the Rules and Regulations of the US Lottery similarly assert that the tribe "does not waive any of its sovereign immunity in respect to the US Lottery or in respect to claims that are asserted in connection with the US lottery." Accordingly, in order for this court to properly assert jurisdiction over this litigation, Congress must have limited the scope of tribal immunity.

By engaging in gaming activities under the IGRA, the tribe has waived sovereign immunity for the purpose of enforcement of the requirements imposed as a statutory condition of conducting such activities. Maxam v. Lower Sioux Indian Comm. of Minn., 829 F.Supp. 277, 281 (D. Minn. 1993). This waiver, however, extends only to the issue of compliance with the IGRA. Id.; Ross v. Flandreau Santee Sioux Tribe, 809 F.Supp. 738, 745 (D. S.D. 1992). Because this case does not involve inquiry into whether the tribe has complied with the IGRA, the Act does not give this court jurisdiction over this action.

Plaintiff argues that, despite the fact that there is no waiver or congressional abrogation of immunity, because this case involves activities beyond the geographical boundaries of the tribe's land, the tribe is not immune from this suit. Plaintiff contends that the gambling activities take place in Missouri, where the gamblers access the lottery from their computers. Defendants argue that the lottery, which is maintained on a computer located on tribal lands, does take place on Indian lands. Because the court concludes that the tribe is entitled to sovereign immunity even if plaintiff's view of the lottery's geographical scope is correct, this issue need not be decided.

Neither the Supreme Court nor the Eighth Circuit has directly addressed the issue of whether district courts may exercise jurisdiction over an Indian tribe when the tribe is engaged in activity outside the boundaries of its reservation.[2] The courts which have addressed this question have held that the doctrine of tribal immunity extends to extra-territorial activities. See Sac & Fox Nation v. Hanson, 47 F.3d 1061, 1064-5 (10th Cir.), cert denied, 116 S.Ct. 57 (1995); In re Greene, 980 F.2d 590, 598 (9th Cir. 1992), cert. denied, 510 U.S. 1039 (1995); Romanella v. Hayward, 933 F.Supp. 163, 167 (D. Conn. 1996), aff'd. on other grounds, 114 F.3d 15

---

[2] Plaintiff relies upon Mescalero Apache Tribe v. Jones, 411 U.S. 145, 148-9 (1973), in which the Court stated that "[a]bsent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to non-discriminatory state law otherwise applicable to all citizens of the State." Mescalero was brought by, not against, an Indian tribe, and involved New Mexico's ability to tax a tribe's off-reservation activities. The court did not address the tribe's immunity from suit and the statement, contained in dicta, upon which plaintiff relies is insufficient to compel a result in their favor in light of the case law directly addressing the issue.

(2d Cir. 1997); Elliott v. Capital Int'l Bank & Trust, Ltd., 870 F.Supp. 733, 734-5 (E.D. Tex. 1996). See also Maynard v. Narragansett Indian Tribe, 984 F.2d 14, 16 (1st Cir. 1993). The court finds the reasoning of In re Greene persuasive:

> Against this background of nearly two hundred years of recognizing sovereign immunity's extra-territorial reach, and the repeatedly recognized necessity of specific congressional action to limit tribal sovereign immunity, congressional silence on the issue of Indian tribal immunity is a compelling, if not controlling, factor. Since only Congress can limit the scope of tribal immunity, and it has not done so, the tribes retain the immunity sovereigns enjoyed at common law, including its extra-territorial component.

Id. at 594. Accordingly, this court cannot exercise jurisdiction over defendant tribe.

The court must next determine whether the tribe's immunity from suit extends to codefendant Unistar. Tribal immunity does not extend to third, non-immune parties solely because the effect of a judgment against the third party will be felt by the tribe. Wichita and Affiliated Tribes of Oklahoma v. Hodel, 788 F.2d 765, 771 (D.C. Cir. 1986). In some circuits it has been ruled that enforcement of sovereign immunity requires that there be a prohibition against bringing actions against tribal enterprises or officials acting on behalf of the tribe. See Shermoen v. United States, 982 F.2d 1312 (9th Cir. 1992), cert. denied, 509 U.S. 903 (1993); Ramey Construction Company v. Apache Tribe of the Mescalero Reservation, 673 F.2d 315 (10th Cir. 1982) (holding that a motel operated as a sub-entity of Indian tribe was entitled to the sovereign immunity of the tribe and was not subject to suit); Bottomly v. Passamaquoddy Tribe, 599

F.2d 1061, 1067 (1st Cir. 1979) (former tribal governors immune from suit); Barker v. Menominee Nation Casino, 897 F.Supp. 389, 393 (E.D. Wis. 1995) (tribal casino and gaming commission not subject to suit). The Eighth Circuit disagrees, citing Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe, 498 U.S. 505, 514 (1991). See Fond du Lac Band of Chippewa Indians v. Carlson, 68 F.3d 253, 257 (8th Cir. 1995), and cases cited.

Assuming the State is correct that the conduct in question violates State law and is not permitted by the federal statute, it would be unfortunate if there were no way, short of federal legislation authorizing suit, to enforce State law.[3] I recognize that there are theories protecting tribes and tribal officials and agents in the same manner as the federal government and its officials and agents would be protected from the enforcement of State law in federal enclaves. It appears, however, that Eighth Circuit law would allow the rule of the Young case to be used by analogy in the context of this litigation. The law is in flux on this issue, however, and I retain the right to revisit it before entering final judgment.

For the above reasons, it is hereby

ORDERED that plaintiff's motion to certify for interlocutory appeal (Doc. 30) is DENIED. It is further

ORDERED that defendants' motion to dismiss for failure to state a claim (Doc. 12) is DENIED as to Unistar and GRANTED as to the tribe.

/s/ Howard F. Sachs

---

[3] Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89 (1984), is not applicable because the court's jurisdiction does not rest on a claim that State law has been violated.

HOWARD F. SACHS
UNITED STATES DISTRICT JUDGE

Dated: November 19, 1997.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
SOUTHERN DIVISION

STATE OF MISSOURI, ex rel. JEREMIAH W. NIXON, Plaintiff,	)
v.	) No. 1:98-CV-14 CAS
UNISTAR ENTERTAINMENT, INC., EXECUTONE INFORMATION SYSTEMS, INC., ERNEST STENSGAR, and DAVID MATHESON, Defendants.	)

Entered: February 9, 1998

MEMORANDUM AND ORDER

This matter is before the Court following removal, on (1) plaintiff's motion to remand, or in the alternative, for a preliminary injunction pursuant to RSMo. §§ 407.100 and 407.020 (1994) of the Missouri Merchandising Practices Act, (2) plaintiff's motion for a hearing on the same, and (3) defendants' motion to transfer the case. A hearing was held on February 5, 1998.

Background.

Plaintiff State of Missouri (the "State") initially filed this suit in the Circuit Court of Madison County, Missouri. Defendants removed the case to this Court on the basis that

the State's claims are preempted by the Indian Gaming Regulatory Act, 25 U.S.C. § 2701, et seq.

The State's first amended complaint alleges that defendants are advertising and selling gambling services in the form of games on the global communications network known as the Internet, to people in thirty-six states including Missouri. Residents of Missouri can purchase tickets for the games over the telephone as well as on the Internet. This enterprise, called the US Lottery, is owned by the Coeur D'Alene Indian Tribe (the "Tribe") and operated by the Tribe and defendant UniStar pursuant to a management agreement.

The State asserts that defendants engaged in fraud, deception, and unfair practices or the concealment of material facts, all of which violate the Missouri Merchandising Practices Act, by: (i) misrepresenting to Missouri citizens that the lotteries and gambling are legal in Missouri, (ii) engaging in the unfair practice of marketing and selling illegal gambling and lotteries which offend the public policy of the State, and (iii) engaging in the unfair practice of allowing persons under twenty-one years of age to gamble which is against the public policy of the State.[1]

---

[1] Prior to removal, the State obtained a temporary restraining order from the Madison County Court on January 29, 1998, which precluded defendants from: (1) violating the Missouri Merchandising Practices Act by the use of any deception or unfair practices in connection with the sale or advertisement of any merchandise, including gambling and lottery services, (2) marketing, or selling by any means including the telephone or Internet any form of gambling in Missouri except that provided in Chapter 313 of the Missouri Revised Statutes, (3) misrepresenting that the gambling services being offered are legal in Missouri, (4) concealing the material fact that the services being offered are illegal in Missouri, and (5) allowing any person under twenty-one years of age to gamble by any method.

The State filed a similar action on May 28, 1997 in the Circuit Court of Jackson County, Missouri. That case, State of Missouri, ex rel., Jeremiah W. (Jay) Nixon v. Coeur D'Alene Tribe, et al., No. 97-0914-CV-W-6, was removed to the United States District Court for the Western District of Missouri, and was assigned to the Honorable Judge Howard F. Sachs. Judge Sachs denied plaintiff's motion to remand and dismissed the Tribe from the suit based on sovereign immunity. Judge Sachs denied the State's motion for certification for interlocutory appeal of the sovereign immunity ruling on January 21, 1998. Thereafter, the State filed a voluntary dismissal of the case, although a motion to dismiss supported by matters outside the pleadings was on file, and then filed a notice of appeal on January 30, 1998. Defendant UniStar filed a motion to vacate the dismissal in the Western District on February 2, 1998.[2]

Discussion.

Plaintiff moves to remand this case for lack of subject matter jurisdiction, or in the alternative for a preliminary injunction. Defendants move for transfer of the case pursuant to 28 U.S.C. § 1404(a), to either a United States District Court in Idaho or to the United States District Court for the Western District of Missouri. Defendants argue that either of these venues would be more convenient than the Eastern District of Missouri. The State opposes the defendants' motion, stating that transfer is not proper because the Court lacks subject matter jurisdiction, and defendants have not proved transfer is warranted.

---

[2] As of on February 4, 1998, the issue of whether the State's voluntary dismissal was valid or required leave of Court was still being examined by Judge Sachs. Therefore, the State's case in the Western District is still pending.

As a threshold matter, the Court rejects the State's contention that it lacks subject matter jurisdiction over this action. The Court concurs with Judge Sachs' opinion which held that the question of whether the Tribe's lottery took place on Indian lands was a question of federal law to be determined by a federal court. State of Missouri, ex rel. Jeremiah (W.) Jay Nixon v. Coeur D'Alene Tribe, et al., No. 97-0914-CV-W-6, 1997 WL 603834, at *2 (W.D. Mo. Sept. 29, 1997). Judge Sachs found that a federal question was presented in terms of the preemptive scope of the Indian Regulatory Gaming Act, 25 U.S.C. § 2701, et seq., and because a federal question was at issue, there was no Eleventh Amendment bar to removal of the State's action. Id. at *2-3. Accordingly, the Court will deny the State's motion to remand and address defendants' motion to transfer.

Defendants assert that the State has engaged in forum shopping and state one of the primary purposes of § 1404(a) is to remedy the evils of forum shopping. Defendants assert that judicial economy supports transfer of the instant case to the Western District of Missouri. The State's prior case had progressed for eight months in the Western District and Judge Sachs had issued two substantive written opinions prior to the filing of the State's voluntary dismissal. The State responds that it has not engaged in forum shopping and observes that the defendants removed this case to the Eastern District of Missouri. The State maintains that its choice of forum is and has always been the Missouri state courts.

The party seeking a transfer of venue bears the burden of proving that a transfer is warranted. Terra Int'l v. Mississippi Chemical Corp., 119 F.3d 688, 695 (8th Cir. 1997). Title 28 U.S.C. § 1404(a) governs a district court's ability to transfer a case to another district. This section lists three general factors courts must consider in determining whether to transfer a case to a different forum: (1) the convenience of the parties, (2) the convenience of the witnesses, and (3) the interests of justice. I-T-E Circuit

Breaker Co. v. Regan, 348 F.2d 403, 405 (8th Cir. 1965); Houk v. Kimberly-Clark Corp., 613 F. Supp. 923, 927 (W.D. Mo. 1985). Courts, however, are not limited to these enumerated factors, and in recognition of the need for a case-by-case evaluation have considered other factors. Terra, 119 F.3d at 691.

Defendants assert that Judge Sachs has gained familiarity with both the facts and the relevant law of this case, particularly as it relates to the Indian Gaming Regulatory Act. Defendants claim that few federal judges in Missouri are familiar with the Indian Gaming Regulatory Act and that another judge could only gain such experience through the expenditure of substantial and scarce judicial resources.

The State claims that defendants have not met their burden of proving that transfer is warranted under § 1404(a). In addressing the factors considered by courts in ruling on § 1404(a) motions to transfer, the State asserts its witnesses are scattered throughout Missouri and traveling to one side or the other to testify would not present as great a difficulty as traveling to Idaho. Because the inconvenience of testifying in the Western and Eastern Districts of Missouri are equal, the State asserts convenience of the witnesses is a neutral factor.[3] As for the interests of justice, the State asserts that while Judge Sachs may have familiarity with the law defendants allege governs this case, no judge has yet applied the Missouri Merchandising Practices Act, on which the State's claims are based. The State therefore contends this factor is also neutral with regard to transfer. The State asserts that because the case before Judge Sachs was still in the preliminary stages when the voluntary dismissal was

---

[3] Neither party has addressed the issue of convenience of the parties.

filed, no undue delay would result if this case is not transferred to the Western District.

It is apparent that Judge Sachs has expended a considerable amount of time and judicial resources on the virtually identical case filed in the Western District. Judge Sachs has addressed numerous pleadings, and is familiar with the facts of the case and the applicable law. Over fifty docket entries exist in that case and two written opinions have been issued. Further, Judge Sachs is still considering the effect of the State's attempted voluntary dismissal of the case. In light of the State's concession that convenience of the witnesses is a neutral factor, and because it would serve the interests of justice and preserve judicial economy, the Court concludes that defendants' motion to transfer this case to the United States District Court for the Western District of Missouri should be granted.

Conclusion.

For the foregoing reasons, the Court concludes that plaintiff's motion to remand should be denied, and that transfer of this case to the United States District Court for the Western District of Missouri is appropriate. The temporary restraining order issued by the state court will be dissolved, and plaintiff's motion for a preliminary injunction will be denied.

Accordingly,

IT IS HEREBY ORDERED that plaintiff's motion for hearing is **GRANTED**. [Doc. 9]

IT IS FURTHER ORDERED that plaintiff's motion for remand or in the alternative for a preliminary injunction is **DENIED**. [Doc. 7-1, 7-2]

IT IS FURTHER ORDERED that defendants' Motion to Transfer Venue is **GRANTED**. [Doc. 11]

IT IS FURTHER ORDERED that the temporary restraining order entered by the Circuit Court of Madison County is **DISSOLVED**.

IT IS FURTHER ORDERED that this case is **TRANSFERRED** to the United States District Court for the Western District of Missouri pursuant to 28 U.S.C. § 1404(a).

/s/ Charles A. Shaw
CHARLES A. SHAW
UNITED STATES DISTRICT JUDGE

Dated this 9th day of February, 1998.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

STATE OF WISCONSIN,
Plaintiff,

v.

COEUR D'ALENE TRIBE,
UNISTAR ENTERTAINMENT,
INC. and EXECUTONE INFORMATION
SYSTEMS, INC.,
Defendants.

Entered: February 18, 1998

MEMORANDUM AND ORDER
97-C-711-S

The State of Wisconsin commenced this public nuisance action in Wisconsin Circuit Court challenging the legality of the "US Lottery" operated by defendants Coeur D'Alene Tribe ("Tribe") and Unistar Entertainment, Inc. ("Unistar") on the world wide web and made available to Wisconsin residents. Defendants removed the action to this court on the basis that the legality of the lottery is controlled and state regulation is completely preempted by the federal Indian Gaming Regulatory Act (IGRA). Based upon IGRA's expansive regulation of Indian gaming and the unique federal interest in the regulation of Indian affairs in general, it is appropriate for the court to exercise jurisdiction. Gaming Corporation of America v. Dorsey & Whitney, 88 F.3d 536 (8th Cir. 1996).

The matter is presently before the court on defendants' motion to dismiss the claims on the basis of sovereign immunity and for lack of personal jurisdiction, and on their alternative motion to transfer venue to the Federal District Court for the District of Idaho. The following is a summary of factual allegations, undisputed facts and other background relevant to the pending motions.

BACKGROUND

Defendant Coeur d'Alene Tribe is a federally recognized Indian tribe located on a reservation in Plummer, Idaho. Defendant Tribe owns and operates the National Indian Lottery which it conducts pursuant to a compact with the State of Idaho. Defendant Tribe entered into a management agreement with defendant Unistar, an Idaho Corporation, pursuant to which Unistar manages the National Indian Lottery. Unistar is a wholly owned subsidiary of defendant Executone Information Systems, Inc. The only contacts between Wisconsin and the defendants arise from lottery operations.

One component of the National Indian Lottery is the US Lottery which offers traditional lottery games via the Internet. Unistar manages the US Lottery as the Tribe's agent. The US Lottery solicits participants on a web page on the Internet. The web page advises viewers that participation is legal and that lottery games may be played from thirty-three states, including Wisconsin.

The following summarizes the procedure used by Wisconsin residents to participate in US Lottery. Any Wisconsin computer user with access to the Internet may access the US Lottery web site. Those who access the site are instructed how to register to play the lottery games. Players register by completing a form on their computer screens and submitting the form electronically to the US lottery's computer in Idaho. After registering the user is

offered the opportunity to fund an account by submitting a credit card number and authorization to charge a minimum of $25. After registration defendants mail software to the registrant to be loaded onto the user's computer so that the games can be played. The user's account is debited based on the games played and credited with any winnings.

One hundred eighty Wisconsinites have registered to play the lottery and forty-five of them have deposited funds. Wisconsin players have played 33,732 games and wagered $50,624.50.

Wisconsin law prohibits conducting lotteries, soliciting bets from Wisconsin residents and using wire communications to facilitate betting. Wisconsin claims that defendants' actions in operating the US Lottery are a public nuisance because they violate these laws. Wisconsin also alleges that defendants are liable for misrepresentation based on their statements that the lottery is legal.

MEMORANDUM

Defendant tribe asserts that it is immune from suit and that its immunity extends to the authorized actions of its agent Unistar. Defendant Executone asserts as an independent basis for dismissal that there are insufficient allegations to state a claim against it regardless of any immunity defense. In the alternative defendants assert that they have insufficient contacts with Wisconsin to support personal jurisdiction and that the convenience of parties and witnesses and the interests of justice would be advanced by a transfer to the District of Idaho. Plaintiff denies the applicability of sovereign immunity to a commercial enterprise which extends beyond reservation borders and argues that such an enterprise directed to Wisconsin surely provides sufficient contacts to support personal jurisdiction and justify retaining venue.

Sovereign Immunity

Defendant tribe is undoubtedly correct when it claims that it is immune from suit by the plaintiff. Indian tribes possess common law immunity from suit in the same fashion as other sovereign powers. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 58 (1977). This immunity may be waived by Congress or by the tribe. Id. However any such waiver must be unequivocally expressed and there is no factual support or allegation of such an express waiver.

Plaintiff contends that tribal sovereign immunity does not extend to off reservation activities. Assuming the validity of the premise that the US Lottery constitutes off reservation activity, the law does not support such a limitation on tribal immunity. Two Circuit Courts of Appeal have directly considered the issue and concluded that tribal sovereign immunity exists for extra-territorial commercial activities. In re Greene, 980 F.2d 590, 596-97 (9th Cir. 1992) (extraterritorial sovereign immunity has never been abrogated by Congress and continues in force); Sac and Fox Nation v. Hanson, 47 F.3d 1061, 1064-65 (10th Cir. 1995) (extraterritorial location of commercial activity irrelevant to sovereign immunity). Additionally, the Seventh Circuit Court of Appeals has at least assumed the existence of extra-territorial tribal sovereign immunity in the context of a Rule 19 analysis in contract disputes involving non-tribal parties. United States ex rel. Hall v. Tribal Development Corp., 100 F.3d 476, 477 (1996). See also, Maynard v. Narragansett Indian Tribe, 984 F.2d 14, 16 (1st Cir. 1993); David E. Gretches, et. el., Federal Indian Law, 435 (3d ed. 1993) (Sovereign immunity runs to the tribe, not to tribal land, so that immunity may apply even though an incident occurs off reservation.)

While not expressly addressing the issue, the Supreme Court also recognized that tribal sovereign immunity extends beyond reservation lands in Puyallup

Tribe, Inc. v. Department of Game of Washington, 433 U.S. 165 (1977)("Puyallup III"). The Puyallup cases involved a dispute over the right of the State of Washington to regulate tribal fishing, both on and off reservation, in the Puyallup river. The tribe challenged a state court injunction limiting catches and requiring certain reporting by the tribe on the basis that its sovereign immunity prohibited such an injunction. The Supreme Court held: "The attack is well founded. Absent an effective waiver or consent, it is settled that a state may not exercise jurisdiction over a tribe. This Court, and the commentators all concur." Id. at 172-73 (citations omitted). The Court accordingly vacated the injunction to the extent it purported to enjoin or compel tribal action on and off reservation.

Contrary to plaintiff's assertion, there is no Supreme Court precedent which limits tribal sovereign immunity to on reservation activities. The issue was raised but not addressed in Oklahoma Tax Com'n v. Citizen Band Potawatomi Tribe of Oklahoma, 498 U.S. 505, 511 (1990). In Potawatomi, plaintiff argued that sovereign immunity should be denied because the actions at issue occurred off reservation. Finding no merit in the contention that the actions were off reservation, the Court disposed of the argument without considering whether immunity would apply to off reservation activities. Accordingly, defendant Tribe's motion to dismiss on the basis of sovereign immunity must be granted.

However, the Tribe's sovereign immunity does not extend to its agent, Unistar, under the facts of this case. While it is generally true that tribal agents acting within the scope of their authority benefit from tribal sovereign immunity, this right extends only as far as the limits of the tribe's authority. Defendants argue that once the tribe authorized Unistar's actions concerning the US Lottery, Unistar was rendered immune from suit to the same extent as the Tribe.

> But the argument has a fatal flaw: The argument assumes that common law sovereign immunity protects a sovereign's officials from suit even when they set out to do what the sovereign lacks the power to do. It does not. When a federal officer - or a state officer for that matter - violates the federal Constitution, he exercises a power that his sovereign does not enjoy. That is the rationale for stripping him of his authority and immunity as a federal or state officer: *viz.*, he has exercised a power that his sovereign was powerless to convey to him. See Ex parte Young, 209 U.S. 123, 160. By analogy, an official of an Indian tribe should be stripped of his authority, and corresponding immunity, to act on behalf of his tribe whenever he exercises a power that his tribe was powerless to convey to him.

State of Wisconsin v. Baker, 698 F.2d 1323, 1332 (7th Cir. 1983). Accordingly, a tribe's ability to confer immunity on an agent is coterminous with the limits of tribal authority.

The Supreme Court has repeatedly recognized this principal. In Puyallup III the Court, after acknowledging tribal immunity held that "whether or not the Tribe itself may be sued in a state court without its consent or the consent of Congress, a suit to enjoin violations of state law by individual tribal members is permissible." 433 U.S. at 171. In Potawatami, the Court after upholding tribal sovereign immunity for direct actions against the tribe noted: "We have never held that individual agents or officers of a tribe are not liable for damages in actions brought by the state." 498 U.S. at 514 (citing Ex parte Young). Clearly, the Supreme Court in both instances contemplated viable actions

against tribal agents even when the tribe was immune from suit.

Whether the Tribe had authority to conduct the U.S. lottery notwithstanding conflicting State law, and therefore to confer immunity on Unistar, is an unresolved issue. A tribe cannot generally authorize its agents to violate state law off the reservation. "Indians going beyond reservation boundaries have generally been held subject to nondiscriminatory state law otherwise applicable to all citizens of the State." Mescalero Apache Tribe v. Jones, 411 U.S. 145, 148-49 (1973). Certainly there remain legal and factual issues concerning whether the operation of the US Lottery constitutes actions off reservation and whether such actions, even if contrary to state law, are authorized by IGRA. However, if those issues are ultimately resolved in the plaintiff's favor so that it is determined that the tribe lacks authority to operate the US Lottery in Wisconsin, defendant Unistar cannot find shelter under the Tribe's sovereign immunity umbrella.

Claims against Executone.

The claims against Executone must be dismissed regardless of the scope of sovereign immunity protection because no factual allegations exist against it which could support a claim. In order to survive a challenge under Rule 12(b)(6) a complaint "must contain either direct or inferential allegations respecting all the material elements necessary to sustain recovery under some viable legal theory." Car Carriers, Inc. v. Ford Motor Co., 745 F. 2d 1101, 1106 (7th Cir. 1984). There are two allegations in the complaint relevant to Executone. First, that it is the corporate parent of Unistar (¶ 5) and, second, that the Internet contact associated with the U.S. Lottery is Glenn T. Reifinger of Executone" (¶ 8). These allegations fail to support the elements of any claim for the violation of state law.

The complaint alleges that Unistar, not Executone, operates the lottery. There is no factual basis in the allegations of the complaint to infer that the separate corporate entities of the parties can be disregarded or that Executone on its own did anything to violate Wisconsin law. Executone's motion to dismiss must be granted.

Personal Jurisdiction

Personal jurisdiction is determined first by reference to the Wisconsin long arm statute, which is to be liberally construed in favor of exercising jurisdiction. Federated Rural Elec. Ins. Corp. v. Inland Power & Light Co., 18 F.3d 389, 391 (7th Cir. 1994). If personal jurisdiction is available under the long arm statute the Court then considers whether jurisdiction is consistent with constitutional limits. Mid-America Tablewares, Inc. v. Mogi Trading Co., Ltd., 100 F.3d 1353, 1358-59 (7th Cir. 1996). When resolving an issue of personal jurisdiction on the basis of written materials, the Court accepts all undisputed facts and resolves all factual disputes in favor of plaintiff. Wisconsin Elec. Mfg. Co., Inc. v. Pennant Products, Inc., 619 F.2d 676, 677 n.1 (7th Cir. 1980).

There is no question that the Wisconsin long arm statute permits the assertion of jurisdiction over defendant Unistar based on its actions in operating the US Lottery. Relevant portions of the Wisconsin long arm statute, Wis. Stat. 801.05, provide as follows:

> A court of this state having jurisdiction of the subject matter has jurisdiction over a person served in an action pursuant to §801.11 under any of the following circumstances:
>
> * * *

> (3) Local act or omission. In any action claiming injury to person or property within or without this state arising out of an act or omission within this state by the defendant.
>
> (4) Local injury; foreign act. In any action claiming injury to a person or property within this State rising out of an action or omission outside this State by the defendant, provided in addition that at the time of the injury, either:
>
> (a) Solicitation or service activities were carried on within this state by or on behalf of the defendant;
>
> (b) products, materials, or things processed, serviced or manufactured by the defendant were used or consumed within this State in the ordinary course of trade.

Wisconsin courts have addressed the meaning of these provisions in the context of foreign entities contracting with Wisconsin residents. In State v. Advance Marketing Consultants, Inc., 66 Wis. 2d 706, 225 N.W.2d 887 (1975) the placement of advertisements in newspapers circulated in Wisconsin, the contacting of persons responding to the advertisement and the acceptance of earnest money deposits fulfilled the requirements of 801.05(3). There is no basis to distinguish Advance Marketing from this case. Defendant Unistar solicited participation in the lottery through an Internet web page expressly directed at Wisconsin residents. When residents responded to the solicitation it mailed them custom software, accepted the deposit of funds and entered into a contractual gambling relationship. The use of the Internet rather than a newspaper for solicitation is not a significant departure from the Advance Marketing fact

pattern, particularly where the Internet solicitation was expressly directed to Wisconsin residents.

It is also apparent that jurisdiction could be exercised under either § 8O1.05(4)(a) or (b). Defendant Unistar's web page solicitation meets the requirement of (a) and Wisconsin customers' use of defendants' software to play the games undoubtedly constitutes the use within the state in the ordinary course of business of products processed, serviced or manufactured by the defendant within the meaning of (b).

The remaining question is whether the exercise of jurisdiction over Unistar comports with federal due process limitations. The Supreme Court's discussion of due process requirement in Burger King Corp. v. Rudzewicz, 471 U.S. 462 (1985), is instructive. The minimum contacts requirement is designed as a means to provide fair warning to a defendant that its activities may subject to a suit in a different state. Id. at 472.

> We have noted several reasons why a forum may legitimately exercise personal jurisdiction over a nonresident who "purposefully directs" his activities toward foreign residents. A State generally has a "manifest interest" in providing its residents with a convenient forum for redressing injuries inflicted by out-of-state actors. Moreover, where individuals "purposefully derive benefit" from their interstate activities it may well be unfair to allow them to escape having to account in other states for consequences that arise proximately from such activities; the Due Process Clause may not readily be wielded as a territorial shield to avoid interstate obligations that have been voluntarily assumed.

Id. at 473-74 (citations omitted). Ultimately, the question is whether defendant Unistar should have foreseen and anticipated being sued in Wisconsin. Assuming minimum contacts exist the court considers factors such as the forum State's interest in the controversy, the burden on the defendant and the interests of the States in furthering substantive social policies in assessing whether assertion of jurisdiction would comport with fair play and substantial justice. Id. at 477.

In view of these considerations it is abundantly clear that the Due Process Clause is no obstacle to asserting jurisdiction over Unistar. Defendant should have been and no doubt was well aware that it would be sued by states for violation of anti-gambling laws upon introduction of the US Lottery to state residents via the Internet. It recognized this concern by excluding the residents of 17 states from the list of those who could play. It was well aware that gambling is a highly regulated activity. Knowing this it purposefully solicited gambling relationships with Wisconsin residents and entered into contracts with approximately 180 Wisconsinites. Given the extent and nature of its contacts with Wisconsin a suit here was not merely a foreseeable possibility, it was a virtual certainty.

Under the factors suggested by the supreme court it is equally clear that asserting jurisdiction comports with fair play and substantial justice. Wisconsin has a powerful interest in enforcing its anti-gambling laws which would be substantially undermined if defendant could evade enforcement through Internet gambling. Defendant having undertaken to operate a nationwide lottery can hardly suggest that defending its legality in the states in which it operates is an unreasonable burden. Defendant's IGRA preemption defense, though it may ultimately prevail at some point later in the proceedings on its merits, is not presently before the Court and is not a basis to avoid personal jurisdiction. Advanced Marketing, 66 Wis. 2d at 716.

Considering all of the circumstances, the extent and nature of the contacts between Unistar and Wisconsin fit comfortably within the Wisconsin long arm statute, and the Due Process Clause is not offended by compelling defendant Unistar to appear before this court to defend the legality of the US Lottery.

Venue

Defendant also moves to transfer venue. A motion for change of venue is governed by 28 U.S.C. § 1404(a), which provides:

> For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.

There is no question that this action might have been brought in the District of Idaho. Therefore, the Court's inquiry focuses solely on "the convenience of parties and witnesses, in the interest of justice." In ruling on the transfer motion the court must consider all of the circumstances in the case using the three statutory factors as place holders in the analysis. Coffey v. Van Dorn Iron Works, 796 F. 2d 217, 219 (7th Cir. 1986). The defendant has the burden to establish that the District of Idaho is clearly more convenient than this district for trial of the case. Id. at 220.

Concerning the convenience of the parties and witnesses defendant argues that the presence of Tribal officers in Idaho, the location of documents and the possibility of a view of the premises suggest that transfer is appropriate. Defendant makes no suggestion why the testimony of these witnesses or a view of the premises is relevant to the case. Heller Financial, Inc. v. Midwhey Powder Co., Inc., 883 F.2d 1286, 1293-94 (7th Cir. 1989).

In fact, it appears very likely that the manner in which the lottery functions will not require substantial testimony but will be undisputed or resolved on the basis of documentary evidence which can be readily produced in any forum. Furthermore, it appears likely that any testimony will be by party-controlled witnesses who will appear to testify regardless of the forum. While a transfer might provide greater convenience to the defendant it would be at the expense of the plaintiff. Such a shift in inconvenience does not support transfer.

The only substantive argument in favor of transfer concerns the possibility that the consolidation of cases will advance the interests of justice. Coffey, 796 F.2d at 221. However, there is nothing to suggest that such a consolidation is a reasonable probability particularly because the Missouri District Court, where the most similar action is pending, has given no indication that it intends to transfer its case to Idaho. Any potential consolidation is mere speculation. Furthermore, since the underlying claims are based on different state law, the interest of justice would tend to disfavor transfer even if consolidation were reasonably likely.

The disputed matters in the case which appear to be primarily legal may be promptly and readily resolved in this court. There is nothing to suggest that a transfer to the District of Idaho will substantially advance the convenience of parties or witnesses or the interest of justice.

ORDER

IT IS ORDERED THAT defendant Coeur d'Alene Tribe's motion to dismiss based on Sovereign immunity is GRANTED.

IT IS FURTHER ORDERED that defendant Executone, Inc.'s motion to dismiss pursuant to Rule 12(b)(6) is GRANTED.

IT IS FURTHER ORDERED that the motions of defendant Unistar, Inc. to dismiss or transfer venue are DENIED.

Entered this 18th day of February, 1998.

BY THE COURT:

/s/ John C. Shabaz
JOHN C. SHABAZ
District Judge

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 98-1520WHKC

State of Missouri, ex rel.,	*
Jeremiah W. (Jay) Nixon,	*
Plaintiff-Appellant,	*
v.	*
	*
Coeur D'Alene Tribe, etc	*
Defendant-Appellee.	*

Order Denying Petition for Rehearing
and for Rehearing En Banc

Entered: February 17, 1999

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

February 17, 1999

Order Entered at the Direction of the Court:

/s/Michael E. Gars
Clerk, U.S. Court of Appeals, Eighth Circuit

STATUTES AND REGULATIONS

18 U.S.C. § 1166

§ 1166. Gambling in Indian country

(a) Subject to subsection (c), for purposes of Federal law, all State laws pertaining to the licensing, regulation, or prohibition of gambling, including but not limited to criminal sanctions applicable thereto, shall apply in Indian country in the same manner and to the same extent as such laws apply elsewhere in the State.

(b) Whoever in Indian country is guilty of any act or omission involving gambling, whether or not conducted or sanctioned by an Indian tribe, which, although not made punishable by any enactment of Congress, would be punishable if committed or omitted within the jurisdiction of the State in which the act or omission occurred, under the laws governing the licensing, regulation, or prohibition of gambling in force at the time of such act or omission, shall be guilty of a like offense and subject to a like punishment.

(c) For the purpose of this section, the term "gambling" does not include—

(1) class I gaming or class II gaming regulated by the Indian Gaming Regulatory Act, or

(2) class III gaming conducted under a Tribal-State compact approved by the Secretary of the Interior under section 11(d)(8) of the Indian Gaming Regulatory Act [25 USCS § 2710(d)(8)] that is in effect.

(d) The United States shall have exclusive jurisdiction over criminal prosecutions of violations of State gambling

laws that are made applicable under this section to Indian country, unless an Indian tribe pursuant to a Tribal-State compact approved by the Secretary of the Interior under section 11(d)(8) of the Indian Gaming Regulatory Act [25 USCS § 2710(d)(8)], or under any other provision of Federal law, has consented to the transfer to the State of criminal jurisdiction with respect to gambling on the lands of the Indian tribe.

25 U.S.C. § 2701

§ 2701. Findings

The Congress finds that—

(1) numerous Indian tribes have become engaged in or have licensed gaming activities on Indian lands as a means of generating tribal governmental revenue;

(2) Federal courts have held that section 2103 of the Revised Statutes (25 U.S.C. 81) requires Secretarial review of management contracts dealing with Indian gaming, but does not provide standards for approval of such contracts;

(3) existing Federal law does not provide clear standards or regulations for the conduct of gaming on Indian lands;

(4) a principal goal of Federal Indian policy is to promote tribal economic development, tribal self-sufficiency, and strong tribal government; and

(5) Indian tribes have the exclusive right to regulate gaming activity on Indian lands if the gaming activity is not specifically prohibited by Federal law and is

conducted within a State which does not, as a matter of criminal law and public policy, prohibit such gaming activity.

25 U.S.C. § 2702

§ 2702. Declaration of policy

The purpose of this Act is—

(1) to provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments;

(2) to provide a statutory basis for the regulation of gaming by an Indian tribe adequate to shield it from organized crime and other corrupting influences, to ensure that the Indian tribe is the primary beneficiary of the gaming operation, and to assure that gaming is conducted fairly and honestly by both the operator and players; and

(3) to declare that the establishment of independent Federal regulatory authority for gaming on Indian lands, the establishment of Federal standards for gaming on Indian lands, and the establishment of a National Indian Gaming Commission are necessary to meet congressional concerns regarding gaming and to protect such gaming as a means of generating tribal revenue.

25 U.S.C. § 2703

§ 2703. Definitions

For purposes of this Act--

(1) The term "Attorney General" means the Attorney General of the United States.

(2) The term "Chairman" means the Chairman of the National Indian Gaming Commission.

(3) The term "Commission" means the National Indian Gaming Commission established pursuant to section 5 of this Act [25 USCS § 2704].

(4) The term "Indian lands" means—

(A) all lands within the limits of any Indian reservation; and

(B) any lands title to which is either held in trust by the United States for the benefit of any Indian tribe or individual or held by any Indian tribe or individual subject to restriction by the United States against alienation and over which an Indian tribe exercises governmental power.

(5) The term "Indian tribe" means any Indian tribe, band, nation, or other organized group or community of Indians which--

(A) is recognized as eligible by the Secretary for the special programs and services provided by the United States to Indians because of their status as Indians, and

(B) is recognized as possessing powers of self-government.

(6) The term "class I gaming" means social games solely for prizes of minimal value or traditional forms of Indian gaming engaged in by individuals as a part of, or in connection with, tribal ceremonies or celebrations.

(7) (A) The term "class II gaming" means—

(i) the game of chance commonly known as bingo (whether or not electronic, computer, or other technologic aids are used in connection therewith)—

(I) which is played for prizes, including monetary prizes, with cards bearing numbers or other designations,

(II) in which the holder of the card covers such numbers or designations when objects, similarly numbered or designated, are drawn or electronically determined, and

(III) in which the game is won by the first person covering a previously designated arrangement of numbers or designations on such cards, including (if played in the same location) pull-tabs, lotto, punch boards, tip jars, instant bingo, and other games similar to bingo, and

(ii) card games that—

(I) are explicitly authorized by the laws of the State, or

(II) are not explicitly prohibited by the laws of the State and are played at any location in the State, but only if such card games are played in conformity with those laws and regulations (if any) of the State regarding hours or periods of operation of such card games or limitations on wagers or pot sizes in such card games.

(B) The term "class II gaming" does not include—

(i) any banking card games, including baccarat, chemin de fer, or blackjack (21), or

(ii) electronic or electromechanical facsimiles of any game of chance or slot machines of any kind.

(C) Notwithstanding any other provision of this paragraph, the term "class II gaming" includes those card games played in the State of Michigan, the State of North Dakota, the State of South Dakota, or the State of Washington, that were actually operated in such State by an Indian tribe on or before May 1, 1988, but only to the extent of the nature and scope of the card games that were actually operated by an

Indian tribe in such State on or before such date, as determined by the Chairman.

(D) Notwithstanding any other provision of this paragraph, the term "class II gaming" includes, during the 1-year period beginning on the date of enactment of this Act [enacted Oct. 17, 1988], any gaming described in subparagraph (B)(ii) that was legally operated on Indian lands on or before May 1, 1988, if the Indian tribe having jurisdiction over the lands on which such gaming was operated requests the State, by no later than the date that is 30 days after the date of enactment of this Act [enacted Oct. 17, 1988], to negotiate a Tribal-State compact under section 11(d)(3) [25 USCS § 2710(d)(3)].

(E) Notwithstanding any other provision of this paragraph, the term "class II gaming" includes, during the 1-year period beginning on the date of enactment of this subparagraph [enacted Dec. 17, 1991], any gaming described in subparagraph (B)(ii) that was legally operated on Indian lands in the State of Wisconsin on or before May 1, 1988, if the Indian tribe having jurisdiction over the lands on which such gaming was operated requested the State, by no later than November 16, 1988, to negotiate a Tribal-State compact under section 11(d)(3) of the Indian Gaming Regulatory Act (25 U.S.C. 2710(d)(3)).

(F) If, during the 1-year period described in subparagraph (E), there is a final judicial determination that the gaming described in subparagraph (E) is not legal as a matter of State law, then such gaming on such Indian land shall cease to operate on the date next following the date of such judicial decision.

(8) The term "class III gaming" means all forms of gaming that are not class I gaming or class II gaming.

(9) The term "net revenues" means gross revenues of an Indian gaming activity less amounts paid out as, or paid for, prizes and total operating expenses, excluding management fees.

(10) The term "Secretary" means the Secretary of the Interior.

25 U.S.C. § 2704(a)

§ 2704. National Indian Gaming Commission

(a) Establishment. There is established within the Department of the Interior a Commission to be known as the National Indian Gaming Commission.

* * *

25 U.S.C. § 2705

§ 2705. Powers of the Chairman

(a) The Chairman, on behalf of the Commission, shall have power, subject to an appeal to the Commission, to—

(1) issue orders of temporary closure of gaming activities as provided in section 14(b) [25 USCS § 2713(b)];

(2) levy and collect civil fines as provided in section 14(a) [25 USCS § 2713(a)];

(3) approve tribal ordinances or resolutions regulating class II gaming and class III gaming as provided in section 11 [25 USCS § 2710]; and

(4) approve management contracts for class II gaming and class III gaming as provided in sections 11(d)(9) and 12 [25 USCS §§ 2710(d)(9) and 2711].

(b) The Chairman shall have such other powers as may be delegated by the Commission.

25 U.S.C. § 2706(a) & (b)

§ 2706. Powers of the Commission

(a) Budget approval; civil fines; fees; subpoenas; permanent orders. The Commission shall have the power, not subject to delegation—

(1) upon the recommendation of the Chairman, to approve the annual budget of the Commission as provided in section 18 [25 USCS § 2717];

(2) to adopt regulations for the assessment and collection of civil fines as provided in section 14(a) [25 USCS § 2713(a)];

(3) by an affirmative vote of not less than 2 members, to establish the rate of fees as provided in section 18 [25 USCS § 2717];

(4) by an affirmative vote of not less than 2 members, to authorize the Chairman to issue subpoenas as provided in section 16 [25 USCS § 2715]; and

(5) by an affirmative vote of not less than 2 members and after a full hearing, to make permanent a temporary order of the Chairman closing a gaming activity as provided in section 14(b)(2) [25 USCS § 2713(b)(2)].

(b) Monitoring; inspection of premises; investigations; access to records; mail; contracts; hearings; oaths; regulations. The Commission—

(1) shall monitor class II gaming conducted on Indian lands on a continuing basis;

(2) shall inspect and examine all premises located on Indian lands on which class II gaming is conducted;

(3) shall conduct or cause to be conducted such background investigations as may be necessary;

(4) may demand access to and inspect, examine, photocopy, and audit all papers, books, and records respecting gross revenues of class II gaming conducted on Indian lands and any other matters necessary to carry out the duties of the Commission under this Act;

(5) may use the United States mail in the same manner and under the same conditions as any department or agency of the United States;

(6) may procure supplies, services, and property by contract in accordance with applicable Federal laws and regulations;

(7) may enter into contracts with Federal, State, tribal and private entities for activities necessary to the discharge of the duties of the Commission and, to the extent

feasible, contract the enforcement of the Commission's regulations with the Indian tribes;

(8) may hold such hearings, sit and act at such times and places, take such testimony, and receive such evidence as the Commission deems appropriate;

(9) may administer oaths or affirmations to witnesses appearing before the Commission; and

(10) shall promulgate such regulations and guidelines as it deems appropriate to implement the provisions of this Act.

* * *

25 U.S.C. § 2710(b) & (d)(1)

§ 2710. Tribal gaming ordinances

* * *

(b) Regulation of class II gaming activity; net revenue allocation; audits; contracts.

(1) An Indian tribe may engage in, or license and regulate, class II gaming on Indian lands within such tribe's jurisdiction, if—

(A) such Indian gaming is located within a State that permits such gaming for any purpose by any person, organization or entity (and such gaming is not otherwise specifically prohibited on Indian lands by Federal law), and

(B) the governing body of the Indian tribe adopts an ordinance or resolution which is approved

by the Chairman. A separate license issued by the Indian tribe shall be required for each place, facility, or location on Indian lands at which class II gaming is conducted.

(2) The Chairman shall approve any tribal ordinance or resolution concerning the conduct, or regulation of class II gaming on the Indian lands within the tribe's jurisdiction if such ordinance or resolution provides that—

(A) except as provided in paragraph (4), the Indian tribe will have the sole proprietary interest and responsibility for the conduct of any gaming activity;

(B) net revenues from any tribal gaming are not to be used for purposes other than—

(i) to fund tribal government operations or programs;

(ii) to provide for the general welfare of the Indian tribe and its members;

(iii) to promote tribal economic development;

(iv) to donate to charitable organizations; or

(v) to help fund operations of local government agencies;

(C) annual outside audits of the gaming, which may be encompassed within existing

independent tribal audit systems, will be provided by the Indian tribe to the Commission;

(D) all contracts for supplies, services, or concessions for a contract amount in excess of $25,000 annually (except contracts for professional legal or accounting services) relating to such gaming shall be subject to such independent audits;

(E) the construction and maintenance of the gaming facility, and the operation of that gaming is conducted in a manner which adequately protects the environment and the public health and safety; and

(F) there is an adequate system which—

(i) ensures that background investigations are conducted on the primary management officials and key employees of the gaming enterprise and that oversight of such officials and their management is conducted on an ongoing basis; and

(ii) includes—

(I) tribal licenses for primary management officials and key employees of the gaming enterprise with prompt notification to the Commission of the issuance of such licenses;

(II) a standard whereby any person whose prior activities, criminal record, if any, or reputation, habits and associations pose a threat to the public

interest or to the effective regulation of gaming, or create or enhance the dangers of unsuitable, unfair, or illegal practices and methods and activities in the conduct of gaming shall not be eligible for employment; and

(III) notification by the Indian tribe to the Commission of the results of such background check before the issuance of any of such licenses.

(3) Net revenues from any class II gaming activities conducted or licensed by any Indian tribe may be used to make per capita payments to members of the Indian tribe only if—

(A) the Indian tribe has prepared a plan to allocate revenues to uses authorized by paragraph (2)(B);

(B) the plan is approved by the Secretary as adequate, particularly with respect to uses described in clause (i) or (iii) of paragraph (2)(B);

(C) the interests of minors and other legally incompetent persons who are entitled to receive any of the per capita payments are protected and preserved and the per capita payments are disbursed to the parents or legal guardian of such minors or legal incompetents in such amounts as may be necessary for the health, education, or welfare, of the minor or other legally incompetent person under a plan approved by the Secretary and the governing body of the Indian tribe; and

(D) the per capita payments are subject to Federal taxation and tribes notify members of such tax liability when payments are made.

(4) (A) A tribal ordinance or resolution may provide for the licensing or regulation of class II gaming activities owned by any person or entity other than the Indian tribe and conducted on Indian lands, only if the tribal licensing requirements include the requirements described in the subclauses of subparagraph (B)(i) and are at least as restrictive as those established by State law governing similar gaming within the jurisdiction of the State within which such Indian lands are located. No person or entity, other than the Indian tribe, shall be eligible to receive a tribal license to own a class II gaming activity conducted on Indian lands within the jurisdiction of the Indian tribe if such person or entity would not be eligible to receive a State license to conduct the same activity within the jurisdiction of the State.

(B) (i) The provisions of subparagraph (A) of this paragraph and the provisions of subparagraphs (A) and (B) of paragraph (2) shall not bar the continued operation of an individually owned class II gaming operation that was operating on September 1, 1986, if—

(I) such gaming operation is licensed and regulated by an Indian tribe pursuant to an ordinance reviewed and approved by the Commission in accordance with

section 13 of the Act [25 USCS § 2712],

(II) income to the Indian tribe from such gaming is used only for the purposes described in paragraph (2)(B) of this subsection,

(III) not less than 60 percent of the net revenues is income to the Indian tribe, and

(IV) the owner of such gaming operation pays an appropriate assessment to the National Indian Gaming Commission under section 18(a)(1) [25 USCS § 2717(a)(1)] for regulation of such gaming.

(ii) The exemption from the application of this subsection provided under this subparagraph may not be transferred to any person or entity and shall remain in effect only so long as the gaming activity remains within the same nature and scope as operated on the date of enactment of this Act [enacted Oct. 17, 1988].

(iii) Within sixty days of the date of enactment of this Act [enacted Oct. 17, 1988], the Secretary shall prepare a list of each individually owned gaming operation to which clause (i) applies and shall publish such list in the Federal Register.

* * *

(d) Class III gaming activities; authorization; revocation; Tribal-State compact.

(1) Class III gaming activities shall be lawful on Indian lands only if such activities are—

(A) authorized by an ordinance or resolution that—

(i) is adopted by the governing body of the Indian tribe having jurisdiction over such lands,

(ii) meets the requirements of subsection (b), and

(iii) is approved by the Chairman,

(B) located in a State that permits such gaming for any purpose by any person, organization, or entity, and

(C) conducted in conformance with a Tribal-State compact entered into by the Indian tribe and the State under paragraph (3) that is in effect.

* * *

25 U.S.C. § 2713

§ 2713. Civil penalties

(a) Authority; amount; appeal; written complaint.

(1) Subject to such regulations as may be prescribe Subject to such regulations as may be prescribed by the Commission, the Chairman shall have authority to levy and collect appropriate civil fines, not to exceed $25,000 per violation, against the tribal operator of an Indian game or a management contractor engaged in gaming for any violation of any provision of this Act, any regulation prescribed by the Commission pursuant to this Act, or tribal regulations, ordinances, or resolutions approved under section 11 or 13 [25 USCS § 2710 or 2712].

(2) The Commission shall, by regulation, provide an opportunity for an appeal and hearing before the Commission on fines levied and collected by the Chairman.

(3) Whenever the Commission has reason to believe that the tribal operator of an Indian game or a management contractor is engaged in activities regulated by this Act, by regulations prescribed under this Act, or by tribal regulations, ordinances, or resolutions, approved under section 11 or 13 [25 USCS § 2710 or 2712], that may result in the imposition of a fine under subsection (a)(1), the permanent closure of such game, or the modification or termination of any management contract, the Commission shall provide such tribal operator or management contractor with a written complaint stating the acts or omissions which form the basis for such belief and the action or choice of action being considered by the Commission. The allegation shall be set forth in common and concise language and must specify the statutory or regulatory provisions alleged to have

been violated, but may not consist merely of allegations stated in statutory or regulatory language.

(b) Temporary closure; hearing.

(1) The Chairman shall have power to order temporary closure of an Indian game for substantial violation of the provisions of this Act, of regulations prescribed by the Commission pursuant to this Act, or of tribal regulations, ordinances, or resolutions approved under section 11 or 13 of this Act [25 USCS § 2710 or 2712].

(2) Not later than thirty days after the issuance by the Chairman of an order of temporary closure, the Indian tribe or management contractor involved shall have a right to a hearing before the Commission to determine whether such order should be made permanent or dissolved. Not later than sixty days following such hearing, the Commission shall, by a vote of not less than two of its members, decide whether to order a permanent closure of the gaming operation.

(c) Appeal from final decision. A decision of the Commission to give final approval of a fine levied by the Chairman or to order a permanent closure pursuant to this section shall be appealable to the appropriate Federal district court pursuant to chapter 7 of title 5, United States Code [5 USCS §§ 701 et seq.].

(d) Regulatory authority under tribal law. Nothing in this Act precludes an Indian tribe from exercising regulatory authority provided under tribal law over a gaming establishment within the Indian tribe's jurisdiction if such regulation is not inconsistent with this Act or with any rules or regulations adopted by the Commission.

25 U.S.C. § 2714

§ 2714. Judicial review

Decisions made by the Commission pursuant to sections 11, 12, 13, and 14 [25 USCS §§ 2710-2713] shall be final agency decisions for purposes of appeal to the appropriate Federal district court pursuant to chapter 7 of title 5, United States Code [5 USCS §§ 701 et seq.].

25 U.S.C. § 2720

§ 2720. Dissemination of information

Consistent with the requirements of this Act, sections 1301, 1302, 1303 and 1304 of title 18, United States Code, shall not apply to any gaming conducted by an Indian tribe pursuant to this Act.

28 U.S.C. § 1291

§ 1291. Final decisions of district courts

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title [28 USCS §§ 1292(c), (d), 1295].

28 U.S.C. § 1292(b)

§ 1292. Interlocutory decisions

* * *

(b) When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: Provided, however, That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

28 U.S.C. § 1331

§ 1331. Federal question

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

25 C.F.R. § 531.1(a)

§ 531.1 Required provisions.

A management contract previously approved by the Secretary of the Interior shall conform to the requirements contained in paragraphs (c), (d), (e), (f), (g), (h), (i), and (j) of

this section and a management contract not previously approved by the Secretary shall conform to all of the requirements contained in this section in the manner indicated.

(a) Governmental authority. Provide that all gaming covered by the contract will be conducted in accordance with the Indian Gaming Regulatory Act (IGRA, or the Act) and governing tribal ordinance(s).

* * *

25 C.F.R. § 533.3(a)

§ 533.3 Submission of management contract for approval.

A tribe shall include in any request for approval of a management contract under this part:

(a) A contract containing:

(1) Original signatures of an authorized official of the tribe and the management contractor;

(2) A representation that the contract as submitted to the Chairman is the entirety of the agreement among the parties; and

(3) (i) If the contract has been approved by the Secretary, terms that meet the requirements of §§ 531.1(c), (d), (e), (f), (g), (h), (i), and (j) and § 531.2 of this chapter; or

(ii) Terms that meet the requirements of part 531 of this chapter.

* * *

FEDERAL RULES OF CIVIL PROCEDURE

Fed. R. Civ. P. 41(a)

RULE 41. Dismissal of Actions

(a) Voluntary Dismissal: Effect Thereof.

(1) By Plaintiff; by Stipulation. Subject to the provisions of Rule 23(e), of Rule 66, and of any statute of the United States, an action may be dismissed by the plaintiff without order of court (i) by filing a notice of dismissal at any time before service by the adverse party of an answer or of a motion for summary judgment, whichever first occurs, or (ii) by filing a stipulation of dismissal signed by all parties who have appeared in the action. Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of the United States or of any state an action based on or including the same claim.

(2) By Order of Court. Except as provided in paragraph (1) of this subdivision of this rule, an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper. If a counterclaim has been pleaded by a defendant prior to the service upon the defendant of the plaintiff's motion to dismiss, the action shall not be dismissed against the defendant's objection unless the counterclaim can remain pending for independent adjudication by the court. Unless otherwise specified in the order, a dismissal under this paragraph is without prejudice.

* * *

Fed. R. Civ. P. 54(b)

RULE 54. Judgments; Costs

* * *

(b) Judgment Upon Multiple Claims or Involving Multiple Parties. When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates few than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

* * *

IN THE CIRCUIT COURT OF JACKSON COUNTY,
MISSOURI AT KANSAS CITY

STATE OF MISSOURI, ex rel. JEREMIAH W. (JAY) NIXON, Attorney General, Plaintiff,	)
vs.	) Case No. CV97-13-53
	) Division No. 18
COEUR D'ALENE TRIBE, a Federally Recognized Indian Tribe,	)
SERVE: Ernest Stensgar, Chairman Coeur D'Alene Tribal Counsel Rt. 1, Box 11FA, Plummer, ID 83851 and Lawrence S. Aripa, Vice Chairman Coeur D'Alene Tribal Counsel Rt. 1, Box 11FA Plummer, ID 83851, and	)
UNISTAR ENTERTAINMENT, INC., a Colorado Corporation, 6000 Greenwood Plaza Blvd. #202 Englewood, CO 80111	)
SERVE: Missouri Secretary of State Capitol Building, Room 208 Jefferson City, MO 65102, Defendants.	)

PETITION FOR INJUNCTIVE RELIEF, CIVIL PENALTIES AND OTHER RELIEF

Plaintiff, the State of Missouri, pursuant to § 407.020 *et. seq.*, by and through its Attorney General and Assistant Attorneys General, states in support of its petition:

PARTIES AND JURISDICTION

1. Jeremiah W. (Jay) Nixon is the duly elected and acting Attorney General of the State of Missouri and brings this action in his official capacity pursuant to §§ 407.020, 407.100, RSMo 1994.

2. Defendant Coeur D'Alene Tribe ("Tribe") is a federally recognized Indian Tribe located on a reservation in Plummer, ID. The Tribe is governed by a constitution and by-laws ratified on June 5, 1947 and approved by the Bureau of Indian Affairs on September 2, 1947. Under Article VII, Section 1 of that constitution, the tribal counsel is empowered to "represent the tribe . . . ." Ernest Stensgar and Lawrence S. Aripa are the chairman and vice chairman, of the tribal counsel and are therefore, the proper parties to accept service of process for the Tribe.

3. Defendant UniStar Entertainment, Inc., ("UniStar") is a corporation organized under the laws of the state of Colorado, with its principal place of business at 6000 Greenwood Plaza Blvd., Suite 202, Englewood, CO 80111. James W. Spencer is listed on corporate registration documents as the president of UniStar. UniStar is not registered to do business in Missouri as a foreign corporation, and may therefore be served by delivering the summons and petition to the Missouri Secretary of State.

4. This Court has subject matter jurisdiction over this matter pursuant to § 407.100, RSMo 1994, which allows the Attorney General to seek injunctive relief, restitution, and penalties in circuit court for violations of section 407.020.

5. This Court has personal jurisdiction over these Defendants pursuant to § 506.500.1, RSMo 1994, because, as is more fully set forth below, they have transacted business within the State of Missouri, have entered into a contracts within the State, and/or have committed tortious acts within the State.

6. Venue is proper in this Court pursuant to § 407.100, RSMo 1994, and/or § 508.070, RSMo 1994 because the acts which are alleged to violate section 407.020 occurred in Jackson County, Missouri.

THE MISSOURI MERCHANDISING PRACTICES ACT

7. Section 407.020, RSMo 1994 provides, in pertinent part:

> The act, use, or employment by any person of any deception, fraud, false pretense, false promise, misrepresentation, unfair practice or the concealment, suppression, or omission of any material fact in connection with the sale or advertisement of any merchandise in trade or commerce or the solicitation of any funds for any charitable purpose, as defined in Section 407.453, in or from the State of Missouri, is declared to be an unlawful practice.

Section 407.100, RSMo 1994, provides:

> 1. Whenever it appears to the Attorney General that a person has engaged in, is engaging in, or is about to engage in any method, act, use, practice or solicitation, or any combination thereof, declared to be

unlawful by this chapter, he may seek and obtain, in an action in a circuit court, an injunction prohibiting such person from continuing such methods, acts, uses, practices, or solicitations, or any combination thereof, or engaging therein, or doing anything in furtherance thereof.

2. In any action under subsection 1 of this section, and pursuant to the provisions of the Missouri Rules of Civil Procedure, the attorney general may seek and obtain temporary restraining orders, preliminary injunctions, temporary receivers, and the sequestering of any funds or accounts if the court finds that funds or property may be hidden or removed from the state or that such orders or injunctions are otherwise necessary.

3. If the court finds that the person has engaged in, is engaging in, or is about to engage in any method, act, use, practice or solicitation, or any combination thereof, declared to be unlawful by this chapter, it may make such orders or judgments as may be necessary to prevent such person from employing or continuing to employ, or to prevent the recurrence of, any prohibited methods, acts, uses, practices or solicitations, or any combination thereof, declared to be unlawful by this chapter.

4. The court in its discretion, may enter an order of restitution, payable to the state, as may be necessary to restore to any person who has suffered any ascertainable loss, including but not limited to, any moneys or property, real or personal, which may have been acquired by means of any method, act,

use, practice or solicitation, or any combination thereof, declared to be unlawful by this chapter. It shall be the duty of the attorney general to distribute such funds to those persons injured.

5. The court, in its discretion, may appoint a receiver to insure the conformance to any orders issued under subsection 3 of this section or to insure the payment of any damages ordered under subsection 4 of this section.

6. The court may award to the state a civil penalty of not more than one thousand dollars per violation; except that, if the person who would be liable for such penalty shows, by a preponderance of the evidence, that a violation resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adopted to avoid the error, no civil penalties shall be imposed.

7. Any action under this section may be brought in the county in which the defendant resides, where the violation alleged to have been committed occurred, or where the defendant has his principal place of business.

8. "Advertisement" is defined by § 407.010(1) as "the attempt by publication, dissemination, solicitation, circulation, or any other means to induce, directly or indirectly, any person to enter into any obligation or acquire any title or interest in any merchandise."

9. "Merchandise" is defined by § 407.010(4) as "any objects, wares, goods, commodities, intangibles, real estate or services."

10. "Sale" is defined by § 407.010(6) as "any sale, lease, offer for sale or lease, or attempt to sell or lease merchandise for cash or credit."

11. "Trade or Commerce" is defined by § 407.010(7) as "the advertising, offering for sale, sale, or distribution, or any combination thereof, of any services and any property, tangible or intangible, real personal, or mixed and any other article, commodity, or thing of value wherever situated. The terms 'trade' and 'commerce' include any trade or commerce directly or indirectly affecting the people of this state."

12. 15 CSR § 60-8.020 defines "unfair practice" as follows:

> (1) An unfair practice is any practice which -
>
> (A) Either -
>
> 1. Offends any public policy as it has been established by the Consti-tution, statutes or common law of this state, or by the Federal Trade Commission, or its interpretive decisions; or
>
> 2. Is un-ethical, oppressive or unscrupulous; and
>
> (B) Presents a risk of, or causes, substantial injury to consumers.
>
> (2) Proof of deception, fraud or misrepresentation is not required to prove unfair practices as used in section 407.020.1, RSMo.

FACTS

13. Plaintiff incorporates by reference paragraphs 1 through 12 above as if fully set forth herein.

14. Defendant Tribe, is advertising, promoting, offering and selling gambling services on the global

communications network known as the Internet in the form of lottery games such as "Lotto 6/49," "Super Lotto" and "Lucky 21" to persons in 36 states, including citizens of the State of Missouri. This enterprise is being operated under the name "US Lottery," which is a trademark of UniStar Entertainment, Inc., and is licensed to the National Indian Lottery, which is owned and operated by the Tribe. On good faith information and belief, the US Lottery is being operated and managed on the Internet by UniStar on behalf of the Tribe pursuant to a management agreement executed by the two entities, making UniStar the agent for the Tribe. The Tribe and UniStar have announced and are advertising on the Internet that in the near future, they will be offering and operating other forms of gambling on the Internet such as video poker and slots.

15. Missouri citizens can receive the gambling transmissions sent by the Tribe and UniStar through a website maintained by UniStar and the Tribe on the world wide web. The world wide web is a series of documents stored on computers all over the Internet containing information in various forms, including text, sounds, graphics and video. The US Lottery website on the world wide web can be found by consumers with Internet access by simply typing its "address" on the web, "www.uslottery.com." The Tribe and UniStar automatically respond to each and every Internet user who accesses the website. Upon information and belief, more than 12,000 Missouri consumers have access to the Internet..

16. The gambling and lottery services advertised, promoted offered and sold by the Tribe and UniStar operate as follows: when a consumer accesses the US Lottery website, he immediately receives information on the screen of his computer about the Tribe and UniStar, a description of each game being offered, instructions on how to register to play the games and instructions on how to open and fund an account to activate play.

17. A consumer residing in Missouri would register to participate in the gambling activity by filling in the blank spaces on an application prepared by the Tribe and UniStar which appears on the computer screen when the consumer clicks his mouse cursor on the "Registration" icon. A copy of the application is attached as Exhibit "A" and incorporated by reference. Per the instructions given by the Tribe and UniStar, the completed application is electronically transmitted to the US Lottery by clicking the mouse cursor on the word "Submit." Acknowledgment of receipt and processing of the application is received by the consumer on his computer screen almost immediately. A lottery account for the consumer has now been opened. The consumer funds the account with a minimum deposit of $25.00, an amount specified by the Tribe and UniStar. This deposit can be made only by credit card per the requirement of the Tribe and UniStar. The instructions by the Tribe and UniStar on opening an account are attached as Exhibit "B" and incorporated by reference. Depending on the consumer's computer's capacity, the Tribe and UniStar may then mail a CD-Rom disc to the consumer to enable the consumer to receive transmission of the lottery games.

18. Once the consumer's account has been funded, the consumer is free to play one of three gambling activities currently being offered and operated by the Tribe and UniStar. When the consumer chooses Lotto 6/49, for which tickets are priced by the Tribe and UniStar at $1 each, the consumer chooses five numbers by typing them on the computer screen (a sixth number is provided for "free" by the Tribe and UniStar). The picture of a number selector machine appears on the screen which immediately produces a selection of six numbered balls out of 49. If the consumer's numbers are chosen, he immediately wins a cash prize of up to $1,000,000.00. As the Tribe and UniStar state in their description of the game "rather than wait a week to

find out whether you won, we provide your own personal and immediate drawing."

19. Super Lotto is similar to Lotto 6/49, except that 10 numbers out of 80 can be chosen. Jackpots for this game range from $10,000.00 for $1.00 tickers to $100,000.00 for $10.00 tickets. The third game "Lucky 21," is described by the Tribe and UniStar as an "exciting 'scratch-off' variation of the tradition Blackjack." Once again, the determination of winning or losing is immediate and the prizes for this game range from $5,000.00 for $1.00 tickets to $250,000.00 for $10.00 tickets. The Tribe's and UniStar's descriptions of these games are attached as Exhibit "C," and incorporated by reference herein.

20. A Missouri consumer who accepts the Tribe's and UniStar's offer to purchase these gambling and lottery services does so in Missouri and would play these games, immediately either winning or losing them, on his computer in Missouri.

21. On their US Lottery website, the Tribe and UniStar represent that the above gambling activities are legal, but are being offered only in 36 of the 50 states, indicating that the activities are legal in the 36 states in which they are being offered. Missouri is one of the 36 states in which the Tribe and UniStar are offering their gambling and lottery services. A copy of the web site page containing this information is attached as Exhibit "D," and incorporated by reference herein. The gambling and lottery services being offered by the Tribe and UniStar are not legal in the State of Missouri.

22. On May 20, 1997, an investigator for the Missouri Attorney General's Office followed the instructions provided by the Tribe and UniStar by completing the application for registration and sending it to the US Lottery from a computer located at 3100 Broadway, Kansas City, MO, accepting the Tribe's and UniStar's offer to participate in the lottery games described above. The Tribe and UniStar

immediately notified the investigator that he was registered in the lottery. On May 21, 1997, pursuant to the Tribe's and UniStar's instructions, the investigator funded his account with $25.00 by sending a master card number to the Tribe and UniStar on a computer located at the above address.

23. On May 22, 1997, an investigator for the Missouri Attorney General's Office contacted US Lottery at the telephone number advertised on the website: 1-888-386-7425. The telephone call was placed from a telephone located at 3100 Broadway, Kansas City, Jackson County, Missouri. The telephone call was answered on behalf of the US Lottery by a woman named Wanda. The investigator told Wanda that he was in the State of Missouri and asked if it was legal for him to participate in the US Lottery in the State of Missouri. Wanda told him "Yes, it is." On that same day, the investigator received his password and login name from the US Lottery.

24. On May 23, 1997, the investigator began gambling in the lottery games described above offered and operated by the Tribe and UniStar, utilizing a computer with access to the Internet located at 3100 Broadway, Kansas City, Jackson County, Missouri. The Tribe's and UniStar's offer to provide the above-described gambling services in exchange for payment of the registration fee was accepted in the State of Missouri, causing a contract to be made within the state, and constituting the further transaction of business within the state pursuant to § 506.500, RSMo 1994.

25. "Gambling" is defined by § 572.010(4) as the staking or risking of something of "value upon the outcome of a contest of chance or a future contingent event not under his control or influence, upon an agreement or understanding that he will receive something of value in the event of a certain outcome . . . Gambling does not include any bona fide business transactions valid under the law of contracts . . . any licensed activity, or persons participating in such games which are covered by §§ 313.800 to 313.840, RSMo." A

"lottery" is defined by § 572.010(7) as an "unlawful gambling scheme in which for a consideration the participants are given an opportunity to win something of value, the award of which is determined by chance." The only lottery which can be conducted legally in the State of Missouri is that conducted by the State of Missouri pursuant to §§ 313.200 *et. seq.*, RSMo 1994. Participation by Missouri consumers in the lottery games and gambling services marketed, advertised, offered, sold and promoted by the Tribe and UniStar constitute "gambling" under § 572.010(4), and a "lottery" under § 572.010(7), RSMo 1994. Such gambling and lottery activities are declared unlawful by § 572.020, RSMo 1994.

26. Section 572.080, RSMo 1994, states:

> It is no defense under any section of this chapter relating to a lottery that the lottery itself is drawn or conducted outside Missouri and is not in violation of the laws of the jurisdiction in which it is drawn or conducted.

27. Under § 572.010 (1), a person "'advances gambling activity' if, acting other than as a player, he engages in conduct that materially aids any form of gambling activity. Conduct of this nature includes but is not limited to conduct directed toward the creation or establishment of the particular game, lottery, contest, scheme, device or activity involved . . . ."

28. The Tribe's and UniStar's conduct in advertising, promoting and selling to Missouri consumers access to its gambling and lottery services as described above constitutes the "advancement" and/or "promotion" of gambling under § 572.010(1). Such activities on the part of the Tribe and UniStar and consumers' participation in the services promoted, advertised and sold by the Tribe and

UniStar are declared illegal in the State of Missouri by §§ 572.030 and 572.040, RSMo 1994.

29. Nowhere in the information provided by the Tribe and UniStar, either on the Internet or by telephone, is there any notice that the gambling services advertised, offered, promoted and sold by the Tribe and UniStar, as well as a consumer's participation therein, are illegal in the State of Missouri.

30. The US Lottery website and a designated representative of the Tribe's and UniStar's US Lottery, affirmatively stated that the gambling and lottery services advertised, promoted, offered and sold by the Tribe and UniStar, and the investigator's participation in those activities, were legal in the State of Missouri.

VIOLATIONS OF THE MERCHANDISING PRACTICES ACT

31. Plaintiff incorporates by reference paragraphs 1 through 30, above as if fully set forth herein.

32. The above-described activities constitute the marketing, offering, advertisement, promotion and/or sale of merchandise, to wit: gambling and lottery services, in trade or commerce in the State of Missouri pursuant to §§ 407.010 and 407.020.1, RSMo 1994.

33. Before, during, after and in connection with the marketing, offering, advertising and/or selling of such services, Defendants, their agents, employees and representatives have engaged in deception, fraud, false pretense, false promise, misrepresentation, unfair practice or the concealment, suppression, or omission of material facts, all declared to be unlawful under §407.020, RSMo 1994, in the following respects among others:

(a) Misrepresenting to Missouri citizens that the gambling and lottery services marketed, advertised, promoted and/or sold

by the Tribe and UniStar and the citizens' participation therein are legal in the State of Missouri, when in fact such services and participation are illegal in the State of Missouri;

(b) Omitting, suppressing and concealing from Missouri citizens the material fact that the gambling and lottery services marketed, advertised, promoted and/or sold by the Tribe and UniStar and the citizens' participation therein are prohibited by law in the State of Missouri; and

(c) Engaging in the unfair practice of marketing, offering, advertising, selling and promoting gambling and lottery services which offends the public policy of the State of Missouri against gambling and lotteries as established by Art. III, Sec. 39(9) of the Missouri Constitution and by Chapter 572 of the Missouri Revised Statutes. Such practice presents a risk of or has caused substantial injury to Missouri consumers in that consumers risk losing or have lost and will continue to lose money by participating in the illegal services marketed, advertised, offered, sold and promoted by the Tribe and UniStar.

31. The above violations of § 407.020, RSMo 1994 by the Tribe and UniStar are tortious acts which have had, and continue to have, an impact within the State of Missouri.

PRAYER FOR RELIEF

WHEREFORE, the Attorney General prays this Court for the following relief:

A. A judgment that the Coeur D'Alene Indian Tribe and UniStar Entertainment, Inc., have violated § 407.020, RSMo 1994, as aforesaid;

B. Preliminary and permanent injunctions, pursuant to § 407.100.1, RSMo, 1994, enjoining the Coeur D'Alene Indian Tribe and UniStar Entertainment, Inc., their members, parent corporations, subsidiaries, agents, employees, representatives, attorneys, assigns, and all those acting for them in whatever capacity from:

1. Violating § 407.020, RSMo 1994 by the act, use or employment of any deception, fraud, false pretense, false promise, misrepresentation, unfair practice or the concealment, suppression or omission of any material fact in connection with the sale or advertisement of any merchandise, including but not limited to gambling and lottery services, in trade or commerce in or from the State of Missouri, including but not limited to, that conduct alleged herein;

2. Marketing, advertising, offering, selling and/or promoting by any means, including, but not limited to, the Interact, in or into the State of Missouri any form of gambling and/or lottery as those terms are defined by §§ 572.010(4) and (7), RSMo 1994 or providing the opportunity for Missouri residents to gamble;

3. Misrepresenting that the gambling services and lottery activities marketed, advertised, offered, sold and/or promoted by the Tribe and UniStar and

consumers' participation therein are legal in the State of Missouri; and

4. Concealing, suppressing and omitting the material fact that the gambling services and lottery activities marketed, advertised, offered, sold and/or promoted by the Tribe and UniStar and consumers' participation therein are illegal in the State of Missouri.

C. An Order awarding the State of Missouri restitution, pursuant to § 407.100.4, on behalf of all Missouri consumers who have been injured by the above alleged violations and an additional amount to be paid into the state treasury for the benefit of the Merchandising Practices Revolving Fund as provided in § 407.140.1., RSMo 1994.

D. An Order awarding the State of Missouri a civil penalty of One Thousand Dollars ($1,000.00) against the Tribe and UniStar for each and every violation of § 407.020, in accordance with §407.100.3.

E. An Order requiring the Tribe and UniStar to pay all court costs incurred in this action and all costs of investigation and prosecution of this action, including a reasonable attorney's fee incurred by the Attorney General's Office, as provided for by § 407.130, RSMo 1994.

F. Such further relief as the Court deems just and proper.

Respectfully submitted,
JEREMIAH W. (JAY) NIXON
Attorney General

/s/ Sue A. Sperry

SUE A. SPERRY, #31436
J. DALE YOUNGS, #36716
Penntower Office Building
3100 Broadway, Suite 609
Kansas City, Missouri 64111
(816) 889-5000 FAX 889-5006